

Exhibit A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

FRACTUS, S.A., (CAUSE NO. 2:22-CV-412-JRG
)
Plaintiff, ()
vs. ()
ADT, LLC., (MARSHALL, TEXAS
) MARCH 16, 2022
Defendant. (9:00 A.M.

PRETRIAL CONFERENCE

BEFORE THE HONORABLE RODNEY GILSTRAP
UNITED STATES CHIEF DISTRICT JUDGE

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1 THE COURT: Be seated, please.

2 All right. This is the time set for pretrial matters
3 before the Court in Fractus versus ADT. This is Civil Case
4 No. 2:22-CV-412.

5 Let me ask for announcements on the record.

6 What says the Plaintiff?

7 MR. TRIBBLE: Good morning, Your Honor. Max Tribble
8 for the Plaintiff Fractus. And with me today is Justin
9 Nelson, Joe Grinstein, Craig Smyser, Kelsey Tuohy, and Johnny
10 Ward. And also attending is Elizabeth DeRieux. The Plaintiff
11 is ready for trial, Your Honor.

12 THE COURT: All right. Thank you, counsel.

13 What's the announcement for the Defendant?

14 MR. GORHAM: Good morning, Your Honor. Tom Gorham
15 on behalf of Defendant ADT. With me here today is Michael
16 Zeligier and Ranjini Acharya. Defendant is ready, Your Honor.

17 THE COURT: Thank you.

18 Counsel, let me go through some housekeeping matters with
19 you and then we'll get onto the disputed issues before the
20 Court.

21 This case is set to go to trial on Monday July the 8th.
22 As it stands right now, it looks like it's probably the number
23 one case.

24 When we select the jury, I'm going to afford each side 30
25 minutes per side to examine the venire panel. And as is the

1 Court's typical practice, should you choose to, I'll afford
2 you up to three minutes at the beginning of your examination
3 of the panel to give a very high-level, non--argumentative
4 overview of the issues in the case. If you lapse into
5 argument, I'll probably stop you and embarrass you, so be sure
6 you don't do that.

7 I'm going to select eight jurors to hear the evidence,
8 and there will be four peremptory challenges per side. Each
9 side will have 11 hours per side to put on their evidence,
10 which does not include selecting the jury, opening statements,
11 or closing arguments. Each side will be afforded 30 minutes
12 per side for opening statement and 40 minutes per side for
13 closing arguments.

14 I'm going to direct that the parties follow the Court's
15 usual practice with regard to exchange of demonstratives and
16 meeting and conferring with regard to potential disputes.
17 I'll be in chambers each morning before we begin the trial and
18 can take those up if they have survived the overnight meet and
19 confer process.

20 You'll need to report to my staff by email not later than
21 10:00 p.m. the night before and advise us of what disputes
22 might still be existing between the parties at that time, but
23 you're then to continue your efforts to resolve those
24 disputes. And if by 7:00 a.m. the next morning you still have
25 surviving overnight disputes, then you're to furnish a jointly

1 prepared three-ring binder to chambers at 7:00 a.m. containing
2 the disputed slide, if that's the case, but, in addition, a
3 single paragraph narrative from each side as to what their
4 positions are. You'd be surprised how many times I get a
5 binder with slides in it and no idea what the problems are
6 between the parties. So make sure I have at least a single
7 paragraph on each dispute giving me both Plaintiff and
8 Defendant's position.

9 If you have disputes regarding the designation or
10 counterdesignation for deposition testimony for deposition
11 witnesses, I'll take those on a rolling basis, but my rule is
12 I need to know about any disputes regarding deposition
13 testimony the day before the day it's going to be presented.
14 I don't want those disputes to arise on the day it would be
15 presented and risk having to automatic delay of the trial
16 because of technical issues.

17 I'll take up and hear motions from either party pursuant
18 to Rule 50(a) of the Federal Rules of Civil Procedure after
19 the close of all of the evidence; not at the close of the
20 Plaintiff's case in chief, but at the close of all the
21 evidence.

22 After I've heard and ruled on motions from either party
23 pursuant to Rule 50(a), then I'll conduct an informal charge
24 conference, typically in chambers, definitely off the record,
25 with a free-flowing exchange of information between counsel

1 and the Court where we can discuss any areas where you're not
2 in agreement with regard to the charge and verdict form, and
3 the Court can probe you as to any issues that would be helpful
4 to the Court to discuss.

5 After that, I'll take your input into account through
6 that informal charge conference, I'll generate what I believe
7 to be the appropriate and proper final jury instruction and
8 verdict form, I'll furnish it to you with a chance to review
9 it, and then conduct a formal charge conference on the record
10 where any party may lodge such suggestions as they think are
11 necessary and in the interests of their clients.

12 Let me remind you it's the Court's practice to avoid use
13 of first names only in testimony before the jury. That
14 practice is inherently confusing and it is not in keeping with
15 the proper decorum for a United States District Court. Make
16 sure you have informed your witnesses of this. If your
17 witnesses violate this instruction, then you'll get credit
18 because you didn't teach them not to.

19 I'll refer you to the Court's standing order on
20 protecting confidential or proprietary information by means of
21 sealing the courtroom and that portion of the record. My only
22 request is that you try, where appropriate, to avoid sealing
23 and unsealing in rapid succession so it's on/off, on/off, and
24 we spend a lot of time people going in and out of the
25 courtroom. To the extent you can group or segregate your

1 confidential testimony so that we can minimize the number of
2 times we have to seal and unseal the courtroom, that will be
3 the Court's request. Obviously I'm not going to tell you how
4 to present your evidence, but to the extent we can avoid this
5 on/off, in/out back and forth, that would be helpful.

6 All right. I believe we already have a juror
7 questionnaire in this case, and I'll refer you to
8 Ms. Clendening, the Deputy-In-Charge for this division, as
9 regards access to and use of the information from those jury
10 questionnaires. I'll simply remind you that the Court
11 represents to the public summons for jury duty that they don't
12 need to be concerned about lawyers or jury consultants or
13 anybody else retaining the information in those questionnaires
14 so that they can be as candid as possible, which helps you and
15 helps the Court. So you're not to copy, you're not to scan,
16 you're not to retain in any way any of the information from
17 those jury questionnaires. Simply put, you'll probably be
18 given access to a hard copy, a chance to look at the hard
19 copy, and then an opportunity to return to hard copy to the
20 Clerk.

21 And I don't know how you have taken the depositions that
22 have been taken in this case. To the extent you have the
23 accompanying text with the audio and video, it's always
24 helpful that your clips include that accompanying text, and
25 where it's available I want you to include that.

1 We'll take up the pre-admission of exhibits after we've
2 dealt with disputed motions and disputes regarding motions in
3 limine. We'll follow the Court's standing order with regard
4 to the number and use of pre-admitted exhibits.

5 I will tell you this. In the last trial that I conducted
6 which ended last Friday, there were two instances where the
7 parties came to the Court in the middle of trial and told me
8 that they had determined -- or one party had determined that
9 they had inadvertently overlooked a matter that should have
10 been a pre-admitted exhibit and they wanted the Court to admit
11 it on the fly in the middle of the trial in front of the jury.
12 The other side said they had no objection to it, and it was
13 clear to me that they had reached that conclusion or
14 realization at least before the trial started.

15 The Court's standing order has a mechanism where each
16 side can potentially admit after the pretrial process up to
17 four exhibits if they've truly been inadvertently overlooked,
18 but I would simply say when you realize it's been
19 inadvertently overlooked, bring it to my attention
20 immediately; don't work it out with the other side and forget
21 to tell me when the jury's in the box in the middle of trial.
22 One thing the Court doesn't like is surprises. I asked both
23 sides in the prior trial why, and I got a bunch of blank
24 stares, so let me just remind you if that comes up and that
25 provision, the standing order, is implemented, which is

1 perfectly fine, just make sure the Court knows as soon as you
2 know.

3 I don't think we're going to have any witnesses who will
4 testify with the aid of an interpreter in this case. Is that
5 correct, counsel? Anybody aware of anybody who will be using
6 an interpreter?

7 MR. TRIBBLE: Your Honor, I believe that we have one
8 may call witness that may -- that we currently don't expect to
9 call her, so --

10 THE COURT: Other than that, you're not expecting
11 any use of interpreters?

12 MR. TRIBBLE: No, Your Honor.

13 THE COURT: How about Defendant?

14 MR. GORHAM: None for ADT, Your Honor.

15 THE COURT: Okay. Well, if that possibility
16 presents itself, Mr. Tribble, just make sure the Court knows
17 when you know.

18 MR. TRIBBLE: We'll try to expedite our process. In
19 part, of course, it depends on how the trial goes.

20 THE COURT: All right. Thank you.

21 I'm going to direct that the parties prepare and deliver
22 to chambers not later than 4:00 tomorrow 12 juror notebooks
23 for use during the trial. I need them tomorrow because
24 Thursday and Friday are federal holidays. And I think you're
25 both -- both sides are familiar with what these need to

1 contain, but to avoid any doubt, they need to contain a
2 complete single-sided printed copy of both of the
3 patents-in-suit, they need to contain a single chart showing
4 any claim language that the Court has construed with the
5 adopted construction on the corresponding column to the right
6 so that you have a side-by-side comparison of claim language,
7 adopted construction, claim language, adopted construction;
8 nothing else from the claim construction opinions to be
9 included.

10 I also want there to be a witness page for each potential
11 witness, either live or by deposition, that includes a
12 head-and-shoulders photograph of the witness imposed during
13 the top of the page with their name underneath. You're not to
14 characterize them with some explanation of who they are;
15 simply put their name. If they've got an earned terminal
16 degree, put 'doctor' in front of it. And then the remainder
17 of those pages should be ruled lines for possible note-taking.
18 And each of those pages should be tabbed with the witness'
19 name on the tab so the jury can more easily and quickly get to
20 the right page when the next witness is called.

21 Then behind those witness pages there should be a new
22 legal pad with three holes punched included in the notebook
23 for additional note-taking. And in the front pocket, please
24 insert a pen. Please make sure it's a pen that doesn't click.
25 I've had that experience before.

1 Also I am directing that each side provide the Court with
2 the actual reports of any testify experts they expect to call,
3 and I want those reports presented in both hard copy in
4 binders and electronically by way of a zip file or appropriate
5 electronic transfer furnished to the Court. And those need to
6 come in by 4:00 tomorrow with the juror notebooks.

7 All right. All right. Any questions about any of
8 those instructions?

9 Any questions from Plaintiff?

10 MR. TRIBBLE: No, Your Honor.

11 THE COURT: Any questions from Defendant?

12 MR. GORHAM: No, Your Honor.

13 THE COURT: Let's turn to the disputed motions that
14 are before the Court. You've given me an email with your
15 suggested order, and I don't have any problem trying to follow
16 that order. I'll do my best to do that. And based on that it
17 looks like the first item we need to take up is Defendant's
18 motion for summary judgment of non-infringement, which is
19 Document 137. No--I'm sorry--138.

20 And let me hear from the moving Defendant on this first.

21 MR. ZELIGER: Good morning, Your Honor.

22 THE COURT: Good morning.

23 MR. ZELIGER: Defendant has moved for summary
24 judgment of non-infringement because none of the accused
25 panels in this case is a mobile communication device or a

1 handheld multifunction wireless device.

2 THE COURT: And Mr. Zeligler, for formality you need
3 to identify yourself for the record before you go into your
4 argument.

5 MR. ZELIGER: Thank you, Your Honor. Michael
6 Zeligler for the Defendant ADT.

7 THE COURT: Thank you.

8 MR. ZELIGER: There are three asserted patents in
9 this case--the '365 and the '887 Patent. All of the asserted
10 claims of that patent contain the phrase 'mobile communication
11 device'. And the third patent, the '103 Patent, all asserted
12 claims the phrase 'handheld multifunction wireless device'.

13 THE COURT: Right. And I think I misspoke when I
14 said the two patents-in-suit; it's the three patents-in-suit.
15 You're correct.

16 MR. ZELIGER: On the first issue, Your Honor, the
17 term 'mobile communication device', the Court has construed
18 that this term should be ascribed its plain and ordinary
19 meaning. That construction is consistent with the
20 specification of the -- shared among the two patents, the '365
21 and the '887, and there are examples in the specification of
22 mobile communication devices, such as cell phones and PDAs.
23 Those can be found at figures 12 and 13.

24 This construction is also consistent with the file
25 history during which the patentee amended claims and

1 specifically claimed the term 'mobile communication device'.

2 The Plaintiff in this case has tried to after-the-fact
3 change the plain and ordinary meaning by offering an extrinsic
4 construction concerning the mobile electronic--excuse
5 me--'mobile magnetic spectrum', and that's the term that they
6 would like the Court to apply, instead of the term's plain and
7 ordinary meaning. The problem is that's a made-up term
8 entirely for this case. It doesn't appear in the intrinsic
9 record anywhere, and the Plaintiff hasn't provided any
10 indication that it appears elsewhere in the art. It's a term
11 that's been invented for this case.

12 Taking that plain and ordinary meaning and apply it to
13 the accused devices in this case and it becomes clear that the
14 ADT security panels are fixed. They are most typically
15 mounted to a wall, bolted to a wall, hard-wired for power into
16 the house's electrical supply. They are designed not to move.

17 Now, you will hear some evidence and you've seen in the
18 papers an indication about an alternate method of housing the
19 device; what I will refer to as the tabletop mount. It
20 doesn't change the issues for summary judgment. In some
21 limited instances, someone can have a panel bolted to a
22 housing support that support -- that sits on a table, but that
23 housing itself is, likewise, hard-wired to the house; it is
24 not designed to move.

25 Plaintiff will try to explain that the hard-wired power

1 supply has a back-up battery, giving the implication that you
2 can then use this battery as you move around the home with
3 your security panel. That's not the purpose of the back-up
4 battery. The purpose of the back-up battery is so that the
5 fixed device works even during a power outage. And ADT is
6 required to have a hard-wired power connection and the battery
7 back-up in order to be consistent with the UL specifications.

8 Let me pause and see if the Court has any questions on
9 the issue of 'mobile communication device'.

10 THE COURT: Counsel, I'll jump in if I have
11 questions. Thank you. Please continue your argument.

12 MR. ZELIGER: The remaining patent, the '103 Patent,
13 claims 'a handheld multifunction wireless device'. Similarly,
14 the Court has construed this to have its plain and ordinary
15 meaning. Once again, the specification is consistent with
16 this. It talks about a number of different portable handheld
17 devices. The file history is also consistent with the
18 construction where the patentee actually added the term
19 'handheld' during prosecution.

20 And Fractus offers no other construction. Its expert has
21 not proposed a different definition, and so, likewise, these
22 terms -- this term should be consistent with the plain and
23 ordinary meaning of 'handheld'. And the same devices, for the
24 reasons that they are not mobile, are also not handheld. They
25 are bolted to the wall or bolted to a frame that sits on a

1 table that is specifically designed not to move around being
2 held in your hand.

3 Now, to the extent that the Court decides that there's
4 a latent claim construction issue, which Defendant does not
5 assert, but to the extent the Court thinks there is one, we
6 specifically refer to the Court to the *Eon* case which is
7 instructive both in terms of its -- the law and the facts.

8 That is all I have in terms of our opening remarks, Your
9 Honor.

10 THE COURT: All right. Let me hear a response from
11 Plaintiff, then.

12 MR. SMYSER: May I approach, Your Honor?

13 THE COURT: You may.

14 MR. SMYSER: Would you like more than one copy?

15 THE COURT: Just one for me. That's fine. Please
16 proceed.

17 MR. SMYSER: Good morning, Your Honor. Craig Smyser
18 for the Plaintiff Fractus.

19 We have a few slides to aid in the presentation of our
20 argument today, if I might display those to the Court.

21 THE COURT: If you'll slow down a little bit.

22 MR. SMYSER: Yes, sir.

23 THE COURT: Good.

24 MR. SMYSER: So where I would like to start here --
25 Mr. Bolles, if we could show the next slide. Thank you.

1 -- is on the standard -- the legal standard that the
2 Court should be applying to adjudge infringement of these
3 apparatus-only claims.

4 So I think you heard in my colleague's argument that he
5 urges the Court to apply a kind of typical use approach to
6 adjudging infringement of these claims; specifically that
7 because ADT believes the products are not typically used
8 either in a desk mount configuration or a handheld
9 configuration, there is, thus, no infringement, but that is
10 simply the incorrect standard to apply when judging
11 infringement of an apparatus-only claim.

12 THE COURT: Let me ask you this, Mr. Smyser. How
13 much of what I heard from Defendant was argued to Judge Payne
14 during claim construction and not accepted?

15 MR. SMYSER: Your Honor, with respect to 'mobile
16 communication device', we believe all of it was argued to
17 Judge Payne and not accepted. That's detailed in our brief
18 and also in the slides here. At the claim construction
19 hearing, Magistrate Judge Payne characterized -- grouped a set
20 of terms involving 'wireless device', 'portable device', which
21 is no longer in the case, and 'mobile communication device' as
22 the, quote, wireless terms, and described ADT's position as
23 quote, one of the hardest sells that he had dealt with. So we
24 believe this is already resolved and ADT should be precluded
25 from arguing, as ADT did not, for example, move to challenge

1 or appeal Judge Payne's claim construction order on this
2 point.

3 The situation with 'handheld' is similar, although it was
4 not addressed at the claim construction hearing. In ADT's
5 opening claim construction brief, they noted that the parties
6 had dropped the phrase 'handheld multifunction' for
7 construction instead to focus on 'wireless device'. When
8 dropping 'handheld multifunction', ADT noted that the only
9 thing that dropped out of its proposed construction was the
10 capacity of the device to word process or interact with
11 spreadsheets or interact with slides.

12 And so we believe ADT's precluded from arguing this
13 based on its position on claim construction that 'handheld
14 multifunction' actually referred to the capabilities of the
15 device to do things like word processing or PowerPoint slides,
16 for example.

17 THE COURT: All right. Continue, please.

18 MR. SMYSER: Returning to the standard issue, the
19 correct standard to apply for an apparatus-only claim is
20 whether the device is reasonably capable of performing the
21 claimed function without significant alteration. That's
22 actually a standard that we believe ADT agreed with in its
23 opening brief. In its opening brief it quotes the standard
24 for infringement as taking the claims as construed by the
25 Court and comparing them to the limitation -- comparing them

1 limitation-by-limitation to the features of the allegedly
2 infringing device; not how the device is typically used, as
3 ADT would have it.

4 I want to pause here to provide a brief overview of the
5 accused products in the case.

6 So on the left of the slide here, you'll see the devices
7 -- examples of the devices that are accused on the '103
8 Patent. These devices are essentially what I would call
9 iPad-type devices. The asserted claims of the '103 require
10 that all the devices have touch screens, processing units,
11 memory modules, multimedia functionalities or smartphone
12 functionalities, and that's embodied in the devices accused
13 here.

14 THE COURT: Let me ask you to slow down, please.
15 We've got a long day ahead of us.

16 MR. SMYSER: Of course, Your Honor. My apologies.

17 THE COURT: That's all right.

18 MR. SMYSER: So on the left here you can see the ADT
19 command AIO7. 'AIO' I believe stands for all-in-one and 7
20 refers to the screen size.

21 We've actually got one of those devices over at counsel
22 table with the desk mount. You can see it's -- as Mr.
23 Grinstein helpfully demonstrates, it is free to move around,
24 it is free to be interacted with, it is not in any fixed to
25 counsel table by virtue of the desk mount.

1 Similarly, on the bottom of this slide you can see the
2 IQ panel 2. That device similarly is at counsel table and,
3 again, possesses a touch screen, a desk mount.

4 Mr. Grinstein, if you don't mind tapping the screen on
5 that.

6 As you can see, it is on even though it is not connected
7 to power. You're able to interact with it. That is true of
8 the '103 accused products.

9 Now, the devices accused on the '365 and '887 include all
10 of those '103 devices, but they also include a few other type
11 of devices. So you'll see on the slide here the LTE/IA, which
12 is this white sleek-looking panel, that is designed to enable
13 cellular communications for ADT's systems. Again, it has
14 rechargeable batteries. And you'll see on the right the
15 ADT2X16 AIO, which similarly can be desk mounted and possesses
16 the rechargeable batteries and cellular communications
17 technologies.

18 Moving to the question of 'mobile communications device',
19 I've already explained to the Court why we believe ADT should
20 be precluded from even making this argument in the first place
21 given that they lost it at claim construction and did not
22 appeal that order.

23 Now, Mr. Zeliger argued that the specification does not
24 agree with Fractus' proposed construction or the way Fractus'
25 expert interpreted this term when performing the infringement

1 analysis, but I think that's simply incorrect.

2 On the screen here you can see excerpts from the
3 specification of the '365 and '887 Patents, and in those
4 patents it described the, quote unquote, operating frequencies
5 of a mobile communications device, and then goes on to list a
6 number of frequencies and cellular communication standards--in
7 particular, frequency bands.

8 And Mr. Zeligier pointed to figures in the patent,
9 examples, embodiments disclosed until the patents in which the
10 devices were cell phones or PDAs. But it's clear that the
11 patents don't conceive of those as limiting because if you
12 look at the dependent claims of both patents, each one has a
13 dependent claim that indicates a mobile communication device
14 where the mobile communication device is a cell phone or a
15 mobile communication device where that device is either a cell
16 phone or personal digital assistant. That proves, I think,
17 that the patents are contemplating the term 'mobile
18 communication device' in a way broader than just a cell phone
19 or PDA, as ADT would have it.

20 THE COURT: What else?

21 MR. SMYSER: Again, our expert adopts a construction
22 entirely consistent with this intrinsic evidence. The
23 definition adopted in his report, which was not challenged via
24 *Daubert* or motion to strike, is that the mobile communication
25 spectrum includes frequencies between 600 megahertz and 3.5

1 gigahertz. As pointed out, the specification of the patents
2 refers to the mobile frequencies -- the operating frequencies
3 of a mobile communication device in exactly this manner.

4 ADT has suggested that the proper inquiry for this case
5 is guided by the *Eon* case, but *Eon* is not on point either with
6 respect to the patents that were at issue in that case or the
7 products at issue in that case.

8 The patents in *Eon* required portability and mobility in
9 the claim language, and then the patent specification
10 discussed the device moving across, quote, cell boundaries.
11 There's no similar language either in the claims or the
12 specification of the '365 or '887 here, as we've just
13 discussed.

14 And then with respect to the patents in *Eon*--or, pardon
15 me--the products in *Eon*, these were electric utility meters,
16 which I'm sure Your Honor has probably encountered either --
17 maybe even outside the courthouse. Those were bolted in place
18 with a tamper-proof collar. There was unequivocal evidence
19 that this was the only way they could be installed to operate.
20 They required a certified electrician to use -- to install
21 them to a 240-volt line. And I submit that just doesn't bear
22 resemblance to the products accused on the '365 and the '887
23 here, which, as we've discussed, can be operated while moving
24 due to their rechargeable batteries and their capacity to
25 communicate via cellular frequencies.

1 Finally, even under ADT's interpretation of 'mobile
2 communication device', we've submitted I believe undisputed
3 evidence showing that these accused products are mobile, even
4 under ADT's understanding. They are all capable of being
5 disconnected from power, thanks to their rechargeable
6 batteries, while continuing to operate. And although ADT does
7 not go through individually device by device, I would also
8 note that because all of the '103 devices are accused on the
9 '365 and '887, many of these devices have touch screens, desk
10 mounting, and are essentially iPads. They are, thus,
11 reasonably capable of mobile operation, even under ADT's
12 interpretation of the term in question.

13 I think the final point on this is that ADT's only
14 evidence regarding the, quote unquote, typical use of these
15 products is this Underwriters Laboratory certification, but I
16 think that's confusing a third-party certification or a
17 third-party statement with an inherent physical feature of the
18 device. In order to assess infringement, you would not look
19 at what a third party certifies about the device and how it is
20 used; instead, you would look at the actual capabilities of
21 the device in question.

22 With that I would move on to 'handheld', unless Your
23 Honor has further questions.

24 THE COURT: Go ahead.

25 MR. SMYSER: As to 'handheld', we've already

1 discussed why we believe ADT should be precluded from making
2 this argument. But even if ADT is permitted to make this
3 argument, we believe the patent specification indicates a
4 clear intent and a clear understanding that the phrase
5 'handheld multifunction wireless device' refers to devices of
6 a particular size or size range. So this is laid out in our
7 brief on the question and the excerpts of the specification
8 cited are here on this slide.

9 But essentially what the patent describes is a range of
10 devices being characterized as portable or handheld or
11 multifunction wireless devices, which range in size,
12 essentially, from smartphone to a desktop. All of the
13 products here would -- accused on the '103 would qualify under
14 that understanding, and the intrinsic evidence in the patent I
15 think demonstrates that 'handheld' was considered to be a term
16 referring to essentially the size of the device rather than
17 its need to be operated while held in the hand.

18 That being said, these devices can be operated while held
19 in the hand. As Mr. Grinstein helpfully demonstrated, you can
20 pick up the device off the desk, you can hold it in your hand,
21 and, in fact, the fact that all of these devices have touch
22 screens, we would submit, indicates that they are made to be
23 used by hand. As with the '365 and '887 devices, they have
24 rechargeable batteries, and, thus, they are reasonably capable
25 of handheld operation, even under ADT's interpretation of that

1 term.

2 With that, Your Honor, I'm happy to take further
3 questions.

4 THE COURT: I don't think I have any additional
5 questions.

6 MR. SMYSER: Thank you, Your Honor.

7 THE COURT: Anything further from the moving
8 Defendant?

9 MR. ZELIGER: Thank you, Your Honor. Michael
10 Zeligier for ADT. Just two points, Your Honor.

11 The first was Mr. Smyser referred to a portion of the
12 specification that's shared by the '365 and '887 Patents where
13 it says "the operating frequencies of a mobile communication
14 device," he highlighted that, and then there's a list of some
15 particular bands of the electromagnetic spectrum. Those bands
16 of the electromagnetic spectrum are not uniquely for mobile
17 devices. That refers to the character of the ways that they
18 project and receive, and that is true whether a device is a
19 fixed device or a mobile device. This idea that there is a
20 mobile spectrum is entirely manufactured for this litigation.

21 The other point I'd like to make, Your Honor, is that
22 after -- Mr. Smyser made a point of saying that these claims
23 should not be construed based by -- on how the devices might
24 be used. He then suggested that the evidence of infringement
25 is how the devices might be used. He said things like they

1 are reasonably capable of being held in your hand or they are
2 reasonably capable of being moved.

3 Even if that were the case, there is no evidence in this
4 record, [REDACTED]

5 [REDACTED]

6 [REDACTED] [REDACTED]

7 [REDACTED]

8 And as to the claim construction issues, Your Honor, some
9 of what we've discussed may have been heard by Judge Payne,
10 but the reality is Judge Payne chose a construction that was
11 different from what the parties were proposing, and at this
12 point we are simply trying to apply the claims as construed by
13 Judge Payne.

14 Nothing further. Thank you.

15 THE COURT: All right. Thank you, counsel.

16 Well, with regard to Defendant's motion for summary
17 judgment of non-infringement, let me say this. Where the
18 Court has construed certain claim language to have its plain
19 and ordinary meaning, that does not in any way mean that those
20 two different terms have the same plain and ordinary meaning.
21 They each have their own plain and ordinary meaning, which is
22 almost always different than another term's plain and ordinary
23 meaning. Unless the Court specifically finds that the plain
24 and ordinary meaning of A is the same meaning of plain and
25 ordinary meaning of B, you cannot assume that is the case, and

1 I don't find that there's been any such designation here.

2 At the end of the day, counsel, these issues are replete
3 with fact questions that would preclude the entry of summary
4 judgment pursuant to Rule 56, and the Court is not going to
5 substitute its judgment for the jury's fact-finding obligation
6 at this stage.

7 So I'm going to deny the motion, and the jury's going to
8 decide what the plain and ordinary meaning of these terms are,
9 and it's going to hear from competing experts and it's going
10 to judge the credibility and believability of the evidence and
11 determine which version of the story it accepts. And that's
12 what this trial is going to be about, and I'm go not going to
13 grant summary judgment on this issue.

14 Okay. Let's go next to Defendant's motion to exclude the
15 testimony and opinions of Robert Mills. This is Document 137.
16 The parties have also referenced Documents 212 and 219, but
17 we're going to take these up singularly and not collectively.

18 So let me hear from the Movant, the Defendant on the
19 motion to exclude the testimony of Mr. Mills.

20 MR. ZELIGER: Thank you, Your Honor. This is
21 Michael Zeligier for ADT.

22 THE COURT: Please proceed, Mr. Zeligier.

23 MR. ZELIGER: Your Honor, the Defendant moves under
24 *Daubert* to exclude the testimony of Mr. Mills for -- on
25 multiple grounds, but the first thing I want to make clear, if

1 the Court looks at the proposed order and the motion in its
2 entirety, the relief that we sought in the original *Daubert*
3 motion was a complete rejection of Mr. Mills' opinion and that
4 it be disqualified in its entirety. The reasons are as
5 follows.

6 THE COURT: Let me stop you with a question,
7 Mr. Zeligier.

8 MR. ZELIGER: Yes.

9 THE COURT: The [REDACTED] is out of this
10 case, as I understand it.

11 MR. ZELIGER: I think I understand that as well,
12 Your Honor, although there seemed to be some reservation of
13 rights about that.

14 THE COURT: We'll get to the disputed MILs later,
15 but assuming for purposes of discussion that the [REDACTED]
16 [REDACTED] is out of the case, is there any reason to maintain
17 Mr. Mills' opinions that rely upon that? It seems to me those
18 should fall. But --

19 MR. ZELIGER: Your Honor, we agree with that.

20 THE COURT: If you see it differently, tell me.

21 MR. ZELIGER: No. In fact, the entire upper range
22 of Mr. Mills' damages report was based on reliance on the
23 [REDACTED]. In our view, it should be stricken. And
24 prior to bringing this to the Court, when Fractus approached
25 us and said, We're thinking about withdrawing reliance on the

1 [REDACTED], our first question was, Will you still be
2 offering the upper end of the range, and, if so, what's is the
3 basis for it.

4 We didn't get an answer, and we first see an answer in
5 yesterday's filing in which Fractus says for the first time
6 that there was a conversation between Mr. Mills and a
7 gentleman named Mr. Ilario and in the -- yesterday's filing
8 you see they make a reference to paragraph 219 of Mr. Mills'
9 original expert report. That paragraph 219 does not cite to a
10 conversation with Mr. Ilario. So we think there's no evidence
11 to support the high end of the range.

12 But even if the Court were to consider that Mr. Mills
13 had spoken with Mr. Ilario, Mr. Ilario is Fractus' licensing
14 employee. And so basically what they're saying is, I, the
15 expert, Mr. Mills, are recommending this higher end of the
16 damages range because that's what Fractus wants. And the
17 testimony that he says he got -- or the conversation that he
18 said he had with Mr. Mills-- excuse me--with Mr. Ilario is,
19 Mr. Ilario informed me that he would not have accepted less
20 than [REDACTED] per prescriber. So you have them -- the expert
21 saying, I'm going to offer as my opinion what the Plaintiff
22 wants.

23 THE COURT: Well, again, I'm going to take up
24 Document 219 separately --

25 MR. ZELIGER: Yes, Your Honor.

1 THE COURT: -- I don't want to get into this
2 emergency motion issue right now. I want to talk about 138
3 and--excuse me--137 and the underlying *Daubert* motion here.

4 MR. ZELIGER: Yes, Your Honor.

5 And to answer your question more succinctly, then, we
6 think there is no basis to support Mr. Mills' report with
7 respect to the higher end of his damages range when the
8 [REDACTED] proposal is no longer relied upon.

9 THE COURT: All right. Let me hear the rest of your
10 position, then.

11 MR. ZELIGER: With respect to the original *Daubert*
12 motion, Your Honor?

13 THE COURT: Yes.

14 MR. ZELIGER: Okay. Very well.

15 ADT also challenges Mr. Mills' opinions on a number of
16 other bases. The first is that the Vivint license itself is
17 not adequately proven as a comparable in this case. Now, it's
18 easy to do what Fractus suggests and say, Hey, this is your
19 close competitor, how could it not be a comp; but more is
20 required to demonstrate that something is comparable, and
21 Mr. Mills did not meet those standards. He did not consider
22 that there are actually different patents asserted against
23 Fractus--excuse me--against Vivint as are now asserted against
24 ADT, with one exception--the '103 Patent overlaps. The other
25 five patents asserted against Fractus--excuse me--against

1 Vivint are not at issue in this case.

2 He also, we think, didn't adequately consider that Vivint
3 got [REDACTED]
4 [REDACTED] as opposed to the hypothetical negotiation
5 which would only involve the three asserted patents. And on
6 this topic, Mr. Mills simply said, Well, I made some slightly
7 downward adjustment, which isn't quantified or really
8 reflected in the conclusions at all.

9 And we've already discussed the [REDACTED] -- so those
10 are the issues with respect to that.

11 The last piece is a more general concern about Fractus'
12 view that it can tax ADT twice--once for the acquisition of
13 the hardware and a second time for its use. And we refer the
14 Court to the *Caltech* decision, which really is, by analogy, in
15 fairness, because there are two different licensees discussed
16 in the *Caltech* decision, but the reasoning is sound, and that
17 is someone would not in a hypothetical negotiation consider
18 paying X for a device, get a license to that device, and then
19 separately pay Y for use of the licensed device. That
20 violates the principles of exhaustion and it doesn't make
21 sense.

22 THE COURT: How does *Caltech* apply when there were
23 two separate negotiations there; there's only one negotiation
24 here?

25 MR. ZELIGER: Because the logic of *Caltech* was that

1 you can't separately tax the acquisition of the hardware and
2 its use. And what's happening in this case is Mr. Mills is
3 saying ADT itself would agree that it would pay two licenses;
4 it would pay first to acquire the panels with the antennas and
5 then separately would pay every month for their use. There's
6 no reason that Mr. Mills couldn't have come up with an
7 appropriate royalty rate on either the device or its use, but
8 to think that a party would agree to pay twice is unreasonable
9 and is, in fact, belied by the record in this case.

10 In addition to [REDACTED], Fractus made a proposal to 15
11 other companies with this kind of divided -- like device and
12 use ongoing royalty and none of them has accepted it. So not
13 only is it unreasonable in concept; in practice it has proven
14 to be commercially unviable.

15 And for those reasons we challenge Mr. Mills' report in
16 its entirety.

17 THE COURT: All right. Let me hear from the
18 Plaintiff in response.

19 MR. NELSON: Your Honor, may I approach?

20 THE COURT: You may.

21 MR. NELSON: Good morning, Your Honor, and may it
22 please the Court. Justin Nelson from Susman Godfrey.

23 THE COURT: Good morning, counsel. Go ahead.

24 MR. NELSON: Your Honor, I'd like to start just with
25 a direct answer to Your Honor's questioning to Mr. Zelig and

1 also about this two-license issue.

2 Obviously we believe *Caltech* is not relevant. The issue
3 here is that at the same time as Fractus filed the ADT
4 complaint, it filed the Vivint complaint. There is a combined
5 *Markman*, and after the *Markman* hearing, Vivint settled for a
6 [REDACTED]. That license specifically discusses a few
7 things, including the fact in the third 'whereas' clause that

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED] [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED] [REDACTED]

22 [REDACTED]

23 [REDACTED] [REDACTED]

24 [REDACTED]

25 [REDACTED] at

1 [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 As to whether it includes [REDACTED]

5 [REDACTED] t--this is the

6 *Ericsson* case--"allegedly comparable licenses may cover more
7 patents than are at issue in the action; the fact that a
8 license is not perfectly analogous generally goes to the
9 weight of the evidence, not its admissibility."

10 In this Court's *Intellectual Ventures* case, it did not
11 strike a comparable license that involved a portfolio license
12 of thousands because such arguments should be reserved for
13 cross examination at trial.

14 Likewise, in *VirnetX*, the degree of comparability of the
15 license agreements was a factual issue best addressed by cross
16 examination and not by exclusion.

17 And another case, Your Honor, from this Court, "a party
18 may use the royalty rate from sufficiently comparable
19 licenses, value the infringed features based upon comparable
20 features in the marketplace... challenges to the factual
21 accuracy of a benchmark go to evidentiary weight, not
22 admissibility."

23 With respect as well to the services component of it, how
24 ADT uses this is, in fact, to monitor on an ongoing basis. In
25 fact, ADT actually denies it even sells the products. We

1 disagree with that, of course. But then it is built into the
2 ongoing recurring revenue stream that occurs on a monthly
3 basis, [REDACTED]

4 [REDACTED]

5 [REDACTED] [REDACTED]

6 [REDACTED]

7 [REDACTED] [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 And, for example here, when we're talking about the
12 incremental profits, how much in the assertions that they
13 should have adjusted for this, that, or the other should
14 quantify how much of the incremental profits were attributable
15 to non-patented benefits can be addressed there cross
16 examination at trial.

17 And then I want to skip, let's see, all the way to -- on
18 the [REDACTED], I'm happy to address that as well,
19 Your Honor, or we can save that, because I think that is
20 really built into more of the supplemental report as well, but
21 I'm happy to address [REDACTED] now or later.

22 THE COURT: Go ahead and address it now, if you
23 will.

24 MR. NELSON: Yes, Your Honor.

25 Well, first of all, in ADT's original motion it was clear

1 -- just the title of it, by the way, was not to completely
2 exclude Mr. Mills. You can look at the title, as Your Honor
3 has, and it's literally on Docket 137 in terms of the order.
4 What does it say? "ADT's motion to exclude in part the expert
5 disclosure and testimony of Robert Mills." It was not a
6 complete motion to exclude.

7 And so when we look exactly at part 3 of the original ADT
8 *Daubert* motion to exclude Mr. Mills, it says -- the title is
9 "his reliance on the [REDACTED] is
10 improper." And then in the conclusion, what's highlighted on
11 the screen, "What are they asking for with respect to this
12 part? To preclude Fractus' expert from presenting any
13 testimony regarding ADT's subscription revenues, the Vivint
14 agreement, or the [REDACTED]." That's what
15 they asked for.

16 So we did not address the larger issues because they
17 didn't say, Therefore, please conclude the entire [REDACTED]
18 end of the range. We just -- it did not come up. That was
19 not the issue. We addressed the [REDACTED], and in
20 order to narrow the issues for trial we agreed with their
21 limine in their part three of that that Mr. Mills is not going
22 to address the [REDACTED]. We do not believe that
23 the high end of the range falls out because of that, but he is
24 not going to address it.

25 When we said, We'll stipulate it, we'll agree to your

1 limine that you have on this, they said, No. But we're happy
2 -- we intend to honor that; we just don't understand what the
3 line is going to be. We can certainly address it later in
4 terms of we -- if we're not going to talk about [REDACTED], we
5 don't believe they should be able to talk about [REDACTED]
6 either. But just to be clear --

7 THE COURT: No, if it's out it's out --

8 MR. NELSON: Correct.

9 THE COURT: -- across the board.

10 MR. NELSON: Correct. And we are agreeing to that,
11 Your Honor. And so we don't -- I'm sorry, Your Honor.

12 THE COURT: Go ahead.

13 MR. NELSON: No, no. So we don't understand any
14 other issue aside from the fact that we are not going to
15 mention [REDACTED], we have agreed to that, and we're sticking
16 by that, but that does not affect the high end of the range.

17 THE COURT: What else?

18 MR. NELSON: That's it for this motion, Your Honor.
19 Thank you.

20 THE COURT: All right. Any follow-up, Mr. Zeligier?

21 MR. ZELIGER: Just briefly, Your Honor.

22 If there were any doubt about the scope of our motion,
23 take a look at their opposition where they spend the first 12
24 of their 14 pages talking about things other than [REDACTED]
25 as well as the form of our proposed order which asks the Court

1 to strike Mr. Mills' report in its entirety.

2 Thank you, Your Honor.

3 THE COURT: All right. Well, with regard to
4 Defendant's motion to exclude the testimony and opinions of
5 Robert Mills, Document 137, I don't find that the analysis of
6 Mr. Mills as to sales and subscription revenues is erroneous.
7 I don't think *Caltech* applies. I'm going to deny the portion
8 of the motion directed to his opinions on sales and services
9 and the revenues related thereto.

10 I don't find that the Vivint license is not comparable.
11 I think that's a fairly weak argument; and to the extent it
12 has merit, it clearly goes, in my view, to weight and not to
13 whether it should be excluded, so I'm going to deny the motion
14 as to the Vivint comparable license.

15 As to Mr. Mills' apportionment, he does not assume that
16 all the Defendant's products infringe, and I don't find the
17 Defendant's argument either, in its oral argument today or its
18 briefing, compelling here, and I'm going to deny that portion
19 of the motion as well.

20 To preview some of what may come later in the pretrial
21 today, the Court accepts the apparent agreements of both
22 sides, and the [REDACTED] is going to be out of the
23 case for both sides, and it's not going to be out for one and
24 not out for the other--it's out for everybody. And with that
25 being the case, the Court is going to strike paragraphs 176,

1 177, 180, and 221 of Mr. Mills' report that focus on the
2 [REDACTED].

3 Now, that ruling does not necessarily curtail the damages
4 ask of the Plaintiff. We'll take that up as we go through.
5 And it's my understanding that the Plaintiff believes there is
6 additional evidence that supports their damages case. So I
7 don't want somebody to inappropriately construe my ruling on
8 [REDACTED] I'm simply striking those four paragraphs.
9 Whether something is otherwise supported or not is not covered
10 by this ruling.

11 Now, we've got these related companion motions that
12 relate to the MIL's matter, and that includes Plaintiff's
13 motion to supplement the damages report of Mr. Mills.

14 Let me hear from the Plaintiff on this at this juncture.

15 MR. NELSON: I'm sorry, Your Honor. When you
16 said --

17 THE COURT: This is Document 212.

18 MR. NELSON: Yes, Your Honor.

19 Your ruling just now on the paragraphs that are out,
20 section 221 does not mention [REDACTED]. That is the
21 conclusion of the range. Section 219 does mention [REDACTED]
22 And based on Your Honor's comments, I just want to clarify
23 which paragraphs Your Honor was referring to.

24 THE COURT: Let me check those numbers real quick.

25 I think you're right, counsel. I think it should be 219

1 instead of 221.

2 MR. NELSON: Thank you, Your HOnor.

3 THE COURT: For clarity of the record, it's 176,
4 177, 180 and 219.

5 All right. Let's go on to Document 212, Plaintiff's
6 motion to supplement the report of Mr. Mills.

7 Let me hear from Plaintiff on this.

8 MR. NELSON: Thank you, Your Honor.

9 And I don't know who is else is in the courtroom. This
10 might get into some sealed material, and so to the extent that
11 it does.

12 THE COURT: Is there anybody in the courtroom who's
13 not subject to the protective order that's been entered in
14 this case?

15 All right. Then I'm going to order the courtroom sealed
16 for this motion, and I'll direct that anyone present who's not
17 subject to the protective order excuse themselves until the
18 courtroom is reopened and unsealed.

19 (Courtroom sealed.)

20 THE COURT: This is based on counsel's
21 representation that there will be confidential information.

22 MR. NELSON: Justin Nelson again from Susman
23 Godfrey.

24 THE COURT: Go ahead, Mr. Nelson.

25 MR. NELSON: The issue, frankly, it's ADT's material

1 and we are trying to be very careful about relying on it. We
2 may disagree with what they have said, but given that they
3 have designated virtually -- I don't want to be -- I do not
4 want to over-speak. Much of what they have designated is
5 currently deemed AEO, and we want to be cognizant of that.

6 So to back up, Your Honor, this is -- what we're looking
7 at on the screen are ADT's two sales channels. This is from
8 their 10-K. This is also in Mr. Mills' report. There is a
9 direct channel, which is ADT's direct sales to customers, and
10 then there is an indirect channel, which is that -- if Your
11 Honor sees in the first paragraph, under 'indirect channel',
12 it's called the ADT authorized dealer program in that second
13 line, where ADT uses dealers to sell the product in the first
14 instance and then ADT usually, [REDACTED]

15 [REDACTED]
16 [REDACTED]
17 [REDACTED] [REDACTED]
18 [REDACTED]

19 THE COURT: This comes from the initial report, not
20 the proposed supplement. Correct?

21 MR. NELSON: Correct. I'm giving history, Your
22 Honor, about why we are timely in our supplement and our
23 requests during this, Your Honor, but this is from the initial
24 report.

25 During discovery, Your Honor, we were very much aware of

1 this issue. This is an email that Mr. Smyser sent on February
2 1st asking that ADT will supplement its response to Fractus'
3 relevant interrogatory to provide accurate install and
4 purchase data for the accused products. And to the extent ADT
5 relies on third parties to install the accused products, that
6 ADT will produce documents reflecting or tracking those
7 third-party installations.

8 We then consistently asked ADT witnesses in deposition
9 about this issue. So, for example, [REDACTED]

10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED] [REDACTED]
14 [REDACTED]
15 [REDACTED]
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[REDACTED]

[REDACTED]

So there is confusion about that.

This came up in a motion to compel to this Court, and then ADT responded to that motion to compel saying that it would serve a supplemental response to Interrogatory 10 to clarify the nature of the purchase and install data that it has accurately produced, and ADT agrees to a corporate representative to testify on this document, ADT_FRACTUS_8960.

And then in the conclusion of page 7 of its response, "With respect to the purchasing, distribution, installation of the accused products, ADT already has produced accurate data, agrees to supplement its response to Fractus' Interrogatory 10, and agrees to provide an additional 30(b)(6) deposition for a corporate representative to testify regarding this purchase and installation data."

Your Honor issued an order believing those representations from ADT. This is Your Honor's order on page 3, your Honor's May 1st order. Your Honor stated, "ADT's supplemental response, filed hours before the filing of this motion to compel, states that ADT_FACTUS_8960 contains accurate purchase data."

On page 4, again, "Following this deposition, counsel for ADT represented that ADT_FRACTUS_8960, one of the documents shown to Mr. Pope, contains the accurate purchase data, and

1 ADT supplemented its interrogatory response to reflect such."

2 Again, on page 5, "In its response brief, ADT argues that
3 its supplemental interrogatory response is correct.

4 ADT_Fractus_8960 reflects accurate purchase data."

5 And then Your Honor said, "The Court is not persuaded by
6 Fractus' argument that ADT_FRACTUS_8960 reflects inaccurate
7 purchase and installation data. When Mr. Pope answered that
8 he did not know, ADT took corrective measures by supplementing
9 its interrogatory response to identify which of the produced
10 spreadsheets contained the most accurate and complete data."

11 And then Your Honor said, "The parties appear to agree
12 that a supplemental response and additional 30(b)(6) time is
13 appropriate."

14 That occurred actually the day before Your Honor's order.
15 We got it -- a sixth supplemental response that, of course,
16 still did not answer the question and left it open.

17 Here is what we asked -- here's what I asked their
18 30(b)(6) corporate representative the next day. [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED] [REDACTED]

22 And just -- again, compare this, Your Honor, to the slide
23 before where they have represented to us -- I'm not saying it
24 was necessarily malicious. Evidently there was confusion from
25 the testimony of Mr. Pope. Perhaps they thought that it

1 included this purchase data. But the representations to us,
2 to the Court, was that FRACTUS_8960 -- ADT_FRACTUS_8960 was
3 complete and accurate, and that turned out the next day to be
4 untrue; actually the day before to be untrue.

5 THE COURT: Well, let me stop you with just a very
6 practical real-world question. Without going back and
7 assigning blame for how we got to where we got to, we have a
8 six-page, give or take, supplement proposed which was filed on
9 the docket the 19th of June. We're having pretrial today,
10 which I believe today's the 2nd of July. We're picking a jury
11 next Monday the 8th of July. Thursday and Friday are
12 Independence Day holidays.

13 How in the world is the Defendant going to have an
14 opportunity to pose this supplement -- or Mr. Mills on this
15 supplement between now and the trial date, given that the
16 Defendant has not had an opportunity to query the expert on
17 this six pages under oath? I mean, you can point to why it
18 should have been done long ago, but good, bad, or in between,
19 we are where we are today. Practically speaking, how in the
20 world is this going to get taken up and Defendant is going to
21 have a fair opportunity to depose the expert on this
22 supplement prior to trial?

23 MR. NELSON: The short answer, Your Honor, is that
24 we have absolutely no problem offering Mr. Mills for
25 deposition over the weekend, limited to an hour on a

1 supplemental report.

2 And just to back up by a couple of weeks about why we are
3 in this predicament, starting in early June as soon as --
4 after this deposition we got the new data, we asked for a new
5 30(b)(6) deposition. We told them in early June that we were
6 going to supplement. We were expecting them we had a meet and
7 confer. We were expecting them to want another deposition.
8 They never asked for any of this. As Your Honor is
9 well-aware, they didn't ask us for an expedited briefing
10 schedule; instead all we got was this emergency motion.

11 We are more than prepared to offer Mr. Mills again in a
12 supplemental deposition.

13 THE COURT: I haven't gotten to the merits or lack
14 of merit in the emergency motion yet. I'm talking about your
15 motion to supplement the report of Mills.

16 MR. NELSON: Thank you, Your Honor.

17 And that -- we were surprised this was opposed to begin
18 with because we were prepared, we filed the supplemental
19 report. As -- obviously, as Your Honor is aware, it is
20 relatively common for there to be supplemental reports and
21 relatively common for there to be an additional deposition to
22 reflect a supplemental report.

23 THE COURT: The supplemental report, as I see it,
24 was filed on the 19th of June. From the 19th of June until
25 now was there ever any overture from Defendant about, We need

1 to take Mr. Mills' deposition, we need to query him about this
2 six-page supplement.

3 MR. NELSON: No, Your Honor.

4 THE COURT: Did that ever get initiated from the
5 Defendant?

6 MR. NELSON: Mr. Zeligler will correct me if I'm
7 wrong--I am not aware of any.

8 THE COURT: All right. What else do you have on the
9 motion to supplement?

10 MR. NELSON: That's it, Your Honor, except to say,
11 just to follow the chain through, we were diligent from this
12 very time on in obtaining the data and talking to them about
13 the data and telling them in early June, By the way, the
14 numbers don't line up. And so by talking to them in early
15 June about these issues, telling them we intended to file a
16 supplemental report. This timeline is laid out in our reply
17 brief filed yesterday morning about the steps that we took.
18 At every step had a meet and confer about it. All they did
19 was oppose -- said they were going to oppose it, and said --
20 and as early as possible that we intended to file this report
21 as -- within a week of the additional 30(b)(6), which we did.

22 Thank you, Your Honor.

23 THE COURT: Let me hear from the Defendant.

24 MR. ZELIGER: Thank you, Your Honor. This is
25 Michael Zeligler for ADT.

1 THE COURT: So once the supplemental -- proposed
2 supplemental report of six pages came in and was filed on the
3 19th of June, tell me why you never asked to depose Mr. Mills
4 on this supplement. Is there a lack of interest or just don't
5 care or didn't get around to it? I mean, what happened to the
6 time between the 19th of June and today?

7 MR. ZELIGER: Your Honor, a deposition wouldn't
8 alone be sufficient. We thought that that would be futile.
9 So if that was a mistake, then take the blame for that--that
10 was my decision.

11 But the issue here -- let me just give you a little
12 context.

13 THE COURT: All right.

14 MR. ZELIGER: The six-page report proposes a royalty
15 base that defies the entirety of ADT's business. This is
16 complicated material, and the reason is ADT doesn't track any
17 of this information. [REDACTED]

18 [REDACTED] [REDACTED]
19 [REDACTED]

20 We've been working collaboratively with Fractus' counsel
21 throughout. We've had a number of informal discussions.
22 We've gave them access to our witness informally for
23 conversations. We produced stuff that was not required by the
24 motion to compel voluntarily. We went outside and talked to
25 our technology partner alarm.com and persuaded them to provide

1 information in the case.

2 THE COURT: Let me stop you. If deposing Mr. Mills
3 is not adequate here, what do you suggest is adequate in light
4 of this six-page supplement?

5 MR. ZELIGER: A deposition to understand how he came
6 up with a number that exceeds the number of units in the field
7 and then a supplemental responsive report from our expert. We
8 don't understand his logic, so it's not like our expert can
9 even begin to oppose it. [REDACTED] [REDACTED]

10 [REDACTED]

11 THE COURT: I'm not saying it's not important,
12 counsel --

13 MR. ZELIGER: Okay.

14 THE COURT: -- but I don't understand how if at the
15 end of the day you wanted an opportunity to have your expert
16 supplement his or her opinion that you didn't move forward to
17 depose Mr. Mills on this as a predicate to then being able to
18 ask for an opportunity to have a supplement from your expert
19 in which your expert would then be deposed on that targeted
20 matter by the Plaintiff.

21 I mean, we don't have an explanation, or at least I don't
22 have an explanation as to why between the 19th of June and
23 today there was dead silence on this.

24 MR. ZELIGER: I understand, Your Honor.

25 THE COURT: All right. Do you have anything else

1 for me on this?

2 MR. ZELIGER: On this issue, no.

3 THE COURT: Okay. I'm going to do this with regard
4 to the supplement for Mr. Mills. I'm going to grant leave for
5 the Plaintiff to supplement Mr. Mills' report with this
6 proffered supplement of six pages. I'm going to require the
7 Plaintiff to make Mr. Mills available for a one-hour
8 deposition to be conducted at a mutually agreeable time
9 between the parties between now and Monday of next week, the
10 8th.

11 Whether it's over the weekend, whether it's on Friday, I
12 trust it won't be on the 4th of July, but sometime between now
13 and the 8th of July at a time the parties can agree to,
14 Plaintiff's going to present Mr. Mills for a one-hour
15 deposition on the supplement.

16 I don't see that a supplement by Defendant's expert is
17 feasible here, and, quite honestly, any blame for why a
18 supplement from Defendant's expert would not be made available
19 falls, in my view, on the Defendant who saw the request for
20 leave to supplement regarding Mr. Mills on the 19th when it
21 was filed on the docket, the 19th of June, and apparently had
22 no communications and didn't initiate any discussions with
23 Plaintiff about how to go forward with this until today when
24 we're in the middle of pretrial.

25 So to the extent -- the Defendant is going to get an hour

1 to depose Mr. Mills on this, but beyond that I'm not going to
2 grant any additional relief. And to the extent Defendant is
3 unhappy with that, I think they need to look in the mirror,
4 and I find that any justification for a potential supplement
5 from Defendant's expert has effectively been forfeited by
6 Defendant's failure to raise the issue of the Plaintiff's
7 supplement, deposing their expert, and opening the door to the
8 possibility that then their expert could offer a supplement.
9 I think that's been squandered by the Defendant between the
10 19th of June and today.

11 So I'm going to allow -- I'm going to require the
12 one-hour deposition of Mr. Mills for the Defendant to take
13 that one-hour deposition focusing on this six-page supplement
14 and nothing else. And that's all the relief I'm going to
15 grant. But I am going to grant leave -- in light of the
16 totality of the circumstances, I'm going to grant leave for
17 Fractus to supplement Mr. Mills' report with the six-page
18 supplement as tendered on the 19th of June.

19 Now, I want to turn next to the last leg in the
20 three-legged stool about Mr. Robert Mills, and that's the
21 emergency motion for leave to challenge Mr. Mills'
22 supplemental report. That's Document 219.

23 I assume there's not any need to maintain the seal on the
24 courtroom to take up this emergency motion. If there is, let
25 me hear from you; if not, I'm going to order the courtroom

1 reopened.

2 MR. ZELIGER: No need.

3 THE COURT: Then I'll order the courtroom reopened
4 and unsealed.

5 And we're going to turn to Document 219.

6 (Courtroom unsealed.)

7 THE COURT: And let he hear from ADT.

8 MR. ZELIGER: Thank you, Your Honor. This is
9 Michael Zeligier.

10 I'd like to begin by apologizing to the Court by filing
11 this motion on an emergency basis.

12 THE COURT: I think you should, Mr. Zeligier, because
13 the local rules of this Court make it abundantly clear that
14 emergency motions are only those necessary to avoid imminent
15 and irreparable harm, and there are only those that a motion
16 to shorten the response period is inadequate to address. And
17 I don't know how this could be imminent and irreparable harm
18 when these topics were all set for pretrial that was scheduled
19 for today.

20 You know, local rule I believe it's 7, Local Rule CV-7,
21 subpart (1), makes it abundantly clear emergency motions are a
22 very unique and rarely-used tool in this court under these
23 local rules. To give you an illustration, it's the person
24 throwing the emergency brake on the speeding train. It throws
25 everything out of place. It stops everything else. It forces

1 the Court to drop whatever it's doing and turn to that
2 particular motion, which is what I had to do when you filed
3 this a few days ago.

4 And I don't find any basis for it and I'm wondering why
5 that kind of conduct is not sanctionable. You're charged with
6 a fair reading of the local rules, and I don't see how a fair
7 reading of the local rules would justify this kind of a
8 motion. But I want to hear from you on that.

9 MR. ZELIGER: Your Honor, in terms of the urgency, I
10 think that it's our fault. It's our -- you know, we get into
11 these cases and lose sight of the outside perspective and it's
12 wrong.

13 THE COURT: Let me ask you this, Mr. Zeliger.

14 MR. ZELIGER: Yes.

15 THE COURT: I noticed your firm signed off on the
16 emergency motion, but your local counsel did not.

17 MR. ZELIGER: They did not.

18 THE COURT: Was there a conscious decision by local
19 counsel not to join in the emergency motion?

20 MR. ZELIGER: No, it was on oversight on our part.
21 And thanks to the good counsel I received from Mr. Gorham
22 since, we understand the error of that as well and will not
23 repeat that mistake.

24 THE COURT: Why didn't your good sense cause you to
25 pick up the phone and ask Mr. Gorham if he thought this was an

1 appropriate thing to do before you did it?

2 MR. ZELIGER: Well, all I can say to that, Your
3 Honor, is I take full responsibility personally for that
4 decision, and defer to the Court for what's an appropriate
5 outcome. We were wrong and I apologize for it and it won't
6 happen again.

7 THE COURT: You know, Mr. Zeligler, the problem I
8 have is that everything I do is scrutinized by the entire bar,
9 and if I let you flippantly and without any justification file
10 an emergency motion, that signals to everybody else out there
11 it's okay to do that.

12 MR. ZELIGER: May I respond to that, Your Honor?

13 THE COURT: Please.

14 MR. ZELIGER: It was not flippant; it was wrong and
15 it was misguided, but it was sincere. We just significantly
16 misunderstood the local rule on the practice. It was not
17 flippant, but -- I'm not trying to forgive it --

18 THE COURT: Tell me how in the world you could
19 seriously and sincerely believe that this matter was -- causes
20 imminent and irrevocable harm when the subject matter is part
21 of the pretrial we are conducting today and that was already
22 scheduled? How in the world could it be irrevocable and
23 imminent?

24 MR. ZELIGER: I'm not defending decision, Your
25 Honor; I'm only trying --

1 THE COURT: You said you sincerely believed that the
2 local rule applied. I don't understand how in the world you
3 could have.

4 MR. ZELIGER: Because I was wrong. All I'm taking
5 issue is was the intent. I did not intend to disrupt and
6 didn't appreciate the significance of the decision that we
7 made, but I accept responsibility for it.

8 THE COURT: Let me see if Plaintiff has anything to
9 add to the discussion of this matter. If you do, fine; if you
10 don't, fine.

11 MR. NELSON: Your Honor, with respect to this, we
12 take no position and we have nothing to add.

13 THE COURT: All right.

14 Mr. Zeliger, I am going to penalize the Defendants 15 of
15 your designated trial time.

16 MR. ZELIGER: Very well.

17 THE COURT: That means instead of 11 hours to put on
18 your evidence, you have 10 hours and 45 minutes.

19 MR. ZELIGER: Very well, Your Honor.

20 THE COURT: I do not feel I can simply gloss over
21 this and slap your wrist and say, Don't do it again, and send
22 you on your way, because of the signal that would send to
23 everybody else out there, and I just -- I feel compelled to
24 impose some kind of penalty for what's happened. I think this
25 is very limited and very targeted, but it has -- I have to do

1 something here.

2 MR. ZELIGER: I understand, Your Honor. We do
3 not -- we accept the consequence of that decision.

4 THE COURT: All right. Let's move on, then.

5 That should get us past the topic of Robert Mills one way
6 or the other.

7 MR. ZELIGER: Your Honor?

8 THE COURT: Yes, sir.

9 MR. ZELIGER: I think there's still the issue about
10 whether Mr. Mills has any basis for the upper end of his
11 damages range as a result of the Court's decision to strike
12 paragraph 219, and, in our view. There's nothing other than a
13 vague reference to some *Georgia-Pacific* factors that justifies
14 them -- his opinion that the appropriate damages here would be
15 [REDACTED] per subscriber month. That number comes from the
16 [REDACTED]. It appears nowhere else in this record.

17 THE COURT: Well, I assume that's something you're
18 going to talk to Mr. Mills about when you take that one-hour
19 deposition between now and Monday as a part of his
20 supplemental report.

21 Let's just -- this issue appears to be joined whether
22 it's properly before the Court in a motion or not.

23 Let me hear from the Plaintiff on its response to what
24 Defense counsel is arguing here. My understanding is
25 Plaintiff's position is that there is other evidence besides

1 the [REDACTED] that would support this opinion, and
2 that's something I guess we need to get out in the open.

3 MR. NELSON: That's absolutely correct. We laid it
4 out, including -- because it was not addressed in the original
5 motion, we laid it out in yesterday's response. But at
6 paragraphs 141 through 160 of Mr. Mills' report goes through a
7 number of *Georgia-Pacific* factors, including specifically the
8 incremental profits analysis, which is actually part and
9 referenced in section -- paragraph 220 of the Mills report
10 specifically talks about the incremental profits analysis,
11 referencing back to those sections and those paragraphs of the
12 report where the profit is quite high, it's laid out in the
13 actual briefing--I'll be vague because we're in an open
14 courtroom--but he has a very strong opinion about that when
15 during Mr. Mills' original deposition he was asked about this.
16 He talked about the two different methodologies, and he talked
17 about the Vivint license for one and he talked about the
18 incremental profits analysis for the other laying out that
19 particular methodology.

20 Thank you, Your Honor.

21 THE COURT: Well, let me say this. I've dealt with
22 the emergency motion procedurally and I've imposed a penalty
23 on Defendant for having improperly and without any
24 justification presented this to the Court as an emergency
25 motion. Let me now turn to the substance of it, and the

1 substance of it leads me to conclude that this has effectively
2 been waived because it was not raised as a part of the
3 original *Daubert* motion, and you can't come in six days before
4 jury selection and file an improper emergency motion and move
5 for something that you've omitted from your *Daubert* motion.

6 So I am going to deny substantively the Defendant's
7 relief to preclude Mr. Mills from this [REDACTED]
8 monthly royalty rate. To the extent it's supported by his
9 opinion as supplemented and by the other evidence in the case,
10 I'll allow him to put it on. Whether he can persuade the jury
11 that it's credible or not is another matter, but I'm not going
12 to strike or curtail Mr. Mills' opinions with regard to the
13 subscriber monthly royalty rate.

14 MR. NELSON: Thank you, Your Honor.

15 THE COURT: All right. Are we all clear?

16 Then let's move on to Mr. -- or Doctor Feuerstein.
17 That's Document 140. And this is Plaintiff's motion to strike
18 Doctor Martin Feuerstein.

19 MR. GRINSTEIN: Good morning, Your Honor. Joe
20 Grinstein for the Plaintiff Fractus.

21 THE COURT: Good morning, counsel. Please proceed.

22 MR. GRINSTEIN: Your Honor, may I approach with some
23 slides?

24 THE COURT: You may.

25 MR. GRINSTEIN: Your Honor, these were three motions

1 that are grouped together in your motions chart. With the
2 Court's permission, there's a lot of overlap in the motions,
3 and I actually think the most efficient way to deal with the
4 motions would be to first discuss the motion as to Doctor
5 Tentzeris, then discuss the motion to Doctor Feuerstein
6 focusing on just whatever is new and is not already covered.
7 And then I'd like to last handle the motion as to Mr. Andrien,
8 to the extent there's anything in that motion that I haven't
9 already touched on.

10 THE COURT: And you think we can wrap all three of
11 these people into one argument and not get lost in the
12 process?

13 MR. GRINSTEIN: I do believe so; yes, Your Honor.

14 THE COURT: Does that create any problem for you,
15 Mr. Zelig, or for Defense counsel?

16 MS. ACHARYA: No; that's fine.

17 THE COURT: All right. Then proceed on that basis,
18 Mr. Grinstein.

19 MR. GRINSTEIN: So let's start with the motion to
20 exclude with respect to Doctor Tentzeris, and that's Docket
21 141. The fundamental issue with respect to this motion, Your
22 Honor, is that Defendant's damages expert Mr. Andrien wants to
23 present to the jury detailed technical opinions, whose origin
24 is Doctor Tentzeris but which Doctor Tentzeris never included
25 in any expert report.

1 And Your Honor, I know damages experts talk to technical
2 experts all the time and all the time technical experts give
3 damages experts background information, and that's fine. So,
4 for example I'm showing on the screen paragraph 26 from
5 Mr. Andrien's report where he reports an interview with Doctor
6 Feurstein who gave him some background information about the
7 patents and the technology in this case. That's fine. We
8 haven't moved to exclude that. That's totally within the
9 proper ambit of one expert talking to another expert.

10 The problem in this motion, though, is that Mr. Andrien
11 goes much, much further than this. And so, for example, in
12 paragraph 46, he relates an opinion from Doctor Tentzeris
13 where Dr. Tentzeris apparently reviewed all of the patents
14 that were part of the Vivint settlement, used some criteria,
15 and then determined [REDACTED]

16 [REDACTED]
17 That discussion that is related in paragraph 46 appears
18 nowhere in Doctor Tentzeris's report.

19 THE COURT: Let me stop you for a question. Are you
20 telling me that for Expert A to have an opinion and put it in
21 his report that he relied upon Expert B and the information
22 Expert B provided him, that Expert B's opinion has got to be
23 in a report Expert B filed, and if it's not in a report, if
24 it's just in a discussion or a conversation, Expert A can't
25 rely on it?

1 MR. GRINSTEIN: If it's a detailed technical opinion
2 that ought to be subject to *Daubert*, that is our position,
3 Your Honor. And that's our position because -- and there's
4 several --

5 THE COURT: I have expert witnesses all the time
6 that rely on pure hearsay from some other source as the basis
7 for the opinion that's in their report, and that opinion in
8 their report gets queried and attacked and subjected to
9 *Daubert*, but it's not in and of itself excludible because it
10 comes from some third-party hearsay source.

11 MR. GRINSTEIN: That's third-party hearsay source,
12 but the difference is Rule 26 requires that an expert's
13 opinion appear in an expert report. You can't get around Rule
14 26 and say, You know what, we're going to have our damages
15 expert relate some other expert opinion. And this is what
16 that is.

17 Look at paragraph 46. That is an expert opinion. That's
18 the sort of thing that belongs in the report, but it's not
19 going to be subjected to cross examination at trial because --
20 well, first of all, Doctor Tentzeris isn't even showing up to
21 trial; but secondly, how do I cross examine Doctor Tentzeris
22 about this opinion at trial when Doctor Tentzeris is forbidden
23 at trial from going outside the scope of his report? He's not
24 allowed to. He can't mention this opinion at trial, if he
25 were even coming to trial, because he's not allowed to.

1 And I can't ask Mr. Andrien about this particular opinion
2 because I tried to do that at his deposition and every single
3 question I had about this opinion why is one patent more
4 valuable than the other, what are the various criteria that
5 was used by Doctor Tentzeris to come up with this, how do you
6 come up with the numbers here [REDACTED] every
7 single one of those questions was answered, I don't know; ask
8 Doctor Tentzeris. But we can't ask Doctor Tentzeris because
9 he's not going to be at trial, and because he's not allowed to
10 talk about these things anyway because they weren't part of
11 his report.

12 So, Your Honor, I think Your Honor has to draw a line
13 right here, and other cases in this district have drawn that
14 line. You have to draw a line right here and say one expert
15 can't launder opinions from another expert and excuse that
16 expert from getting up here and defending them, or create a
17 situation, you know, that, frankly, puts us between a rock and
18 a hard place. And the rock and the hard place that we're in
19 is Mr. Andrien can't tell us anything about these opinions
20 because we asked him in his deposition and he punted on every
21 single question. And Doctor Tentzeris can't tell us anything
22 about these opinions because they're not in his report and
23 this Court's Motion in Limine 23 says he's not allowed to talk
24 about these things in trial. And we shouldn't be put into the
25 conundrum, Your Honor, of waiving the protections of Motion in

1 Limine 23 and allowing Doctor Tentzeris to just go freestyle
2 it before the jury talking about things that weren't in his
3 report.

4 And that is why, Your Honor, I tried to focus in on
5 paragraph 26 of the report, and I'm trying to draw a line
6 right here. Basic background information, basic factual
7 information, of course a damages expert can talk to a
8 technical expert and rely on that kind of hearsay, and of
9 course that's not excludible, and that's why we haven't moved
10 against paragraph 26. But this situation is different, Your
11 Honor. This is like having a -- you know, damages -- an
12 infringement expert opine, I hereby declare that all of the
13 patents are not infringed, but he doesn't put a report in on
14 that and he just lets the damages expert repeat that opinion.
15 That is an end-run around Rule 26, it's an end-run around the
16 Court's disclosure rules, and it's an end-run around Motion in
17 Limine 23.

18 And so there are -- the only way I can answer Your
19 Honor's inquiry is that there is lines of -- there's
20 variances, there's gradations on this point. Some of this
21 hearsay that an expert can talk to another expert about has
22 got to be okay, and some of it has not got to be not okay, and
23 we're on the not okay part of the line.

24 That's our --

25 THE COURT: I am concerned about your argument that,

1 intentional or unintentional, this series of events has
2 resulted in you being unable to test the opinions. Both sides
3 get the test the other side's opinions before we end up in the
4 middle of the trial with a jury in the box. That is my most
5 concerning point that you've argued so far.

6 MR. GRINSTEIN: And I will say this, Your Honor. We
7 did not depose Doctor Tentzeris, and I am sure the other side
8 will come up and mention that fact so I will address it now.
9 We did not depose him. We often don't depose the other side's
10 technical experts. And that's a strategic issue. We don't
11 like to teach them what their cross examination's going to be
12 like at trial. That should have nothing to do with Your
13 Honor's inquiry that you just made, though.

14 The reasons are two-fold. Number one, there's no
15 addendum to Rule 26 that says you have to put your opinions in
16 an expert report, but if you don't you can just supplement
17 that with a depo -- a deposition; it doesn't matter.

18 But point number two, and more to the point, what if we
19 had deposed Doctor Tentzeris about these opinions? What if we
20 had done that? And what if we'd exposed some really
21 embarrassing flaws that Doctor Tentzeris had come up with his
22 opinions; that he, you know, reached his [REDACTED] valuation
23 by using a dart board? How would we have used that at trial,
24 Your Honor? We couldn't have crossed Mr. Andrien using Doctor
25 Tentzeris's deposition because Mr. Andrien would just say, I

1 don't know; I don't know what Doctor Tentzeris; did you have
2 to ask him. And we couldn't cross Doctor Tentzeris, if he was
3 coming to trial, with Doctor Tentzeris' deposition because
4 he's not allowed to sponsor these opinions in the first place.
5 So how do we cross him at trial with a deposition on opinions
6 that are outside the scope of his report that he's not allowed
7 to testify? I mean, it shouldn't be the price of admission
8 that we have to waive our protections of Motion in Limine 23
9 in order to talk to Doctor Tentzeris.

10 So, in our opinion, failing to put these in the report
11 is what denies us the ability to test these opinions, either
12 pretrial or at trial, and that's because of this Court's
13 Motion in Limine 23, among other things.

14 To move things along, Your Honor, I will move to the
15 Doctor Feurstein motion in limine. Dr. Feurstein's -- I'm
16 sorry; motion to exclude. Doctor Feurstein's motion to
17 exclude raises two separate issues.

18 And I'm sorry. One additional point on Mr. Andrien. I
19 direct the Court's attention, for example, to the *Blitzsafe*
20 opinion--I think it's a Judge Payne opinion; there's several
21 other like it--where experts' opinions that don't appear in
22 their report do get excluded.

23 THE COURT: Do you have anything else on Doctor
24 Tentzeris?

25 MR. GRINSTEIN: I do not, Your Honor. That's why

1 I'm moving to Doctor Feurstein.

2 THE COURT: Okay.

3 MR. GRINSTEIN: Doctor Feurstein raises two separate
4 issues. The first is the same one I just mentioned with
5 respect to Doctor Tentzeris. We've identified the opinions
6 about design-arounds and about the valuation of the patents
7 that Doctor Feurstein does the same thing as Doctor Tentzeris
8 does, so I won't repeat that part of my argument.

9 There is a second part of a problem we have with Doctor
10 Feurstein's report, and that relates to his non-infringing
11 alternative discussion. This is a different argument, Your
12 Honor, because these opinions do appear in his report. He
13 does identify [REDACTED] and discussed
14 them in his report. So we're not making the argument that
15 they don't appear in his report; we are making two other
16 arguments against those non-infringing alternatives, though.

17 The first argument we make is the fact that these
18 opinions from Doctor Feuerstein about these [REDACTED]
19 [REDACTED] only appear in Doctor Feurstein's
20 rebuttal expert report. They were not present in an opening
21 report. And as this Court held via Judge Payne in the *Correct*
22 *Transmission* case just a few months ago -- although I will
23 note before these reports went in, an expert's opinions that
24 something is a non-infringing alternative or not are akin to
25 an affirmative defense by the defendant and they need to go in

1 an opening expert report. Doctor Feurstein's report was a
2 rebuttal report. And what Judge Payne did in the *Correct*
3 *Transmission* case is exclude the defendant's non-infringing
4 alternatives opinions because they waited too long and put
5 them in a rebuttal report. And Judge Payne held that the
6 prejudice from the timing of that and forcing all those
7 opinions in late, in a late round, was sufficient to uphold
8 their exclusion.

9 So our first point about these [REDACTED]
10 [REDACTED], Your Honor, is that they were too late. Doctor
11 Feurstein should have put them in an opening report. They
12 were in a rebuttal report. There is direct authority from
13 Judge Payne just a few months ago on this exact issue.

14 THE COURT: Wasn't the [REDACTED] disclosed during fact
15 discovery?

16 MR. GRINSTEIN: That's my second point, Your Honor,
17 but I will say that point has nothing to do with my first
18 point, whether the [REDACTED] was disclosed in fact discovery or
19 not. What I'm talking about is an expert opinion that says, I
20 have looked at the [REDACTED] and I hereby declare the [REDACTED] to
21 be a non-infringing alternative. Whether that was properly
22 disclosed in discovery or not, an expert's opinion about that
23 is an affirmative burden of proof opinion and it has to go in
24 opening reports.

25 So, I mean, we disclosed our infringement contentions in

1 fact discovery, but we also had to it put in an opening report
2 on our infringement contentions. It's the same thing.

3 But Your Honor does anticipate the second point I have to
4 make. There are [REDACTED] that are
5 discussed by Doctor Feurstein. One of them, one of those
6 [REDACTED] was properly disclosed in fact discovery. And Your
7 Honor will recall we filed a motion to exclude, we thought it
8 was disclosed too late, Your Honor disagreed and said that
9 [REDACTED] was properly disclosed, so that one is in for purposes
10 of my argument.

11 The problem is the other [REDACTED] The other [REDACTED] were
12 products that were previously accused of infringement by
13 Fractus but which Fractus dropped the patents for which they
14 were accused of infringement so they are no longer accused
15 products. Those were never mentioned whatsoever by ADT in any
16 fact discovery. They were never mentioned in an opening
17 report because there was no opening report on non-infringing
18 alternatives. The first time those first [REDACTED] non-infringing
19 alternatives were ever mentioned was in the rebuttal report of
20 Doctor Feurstein, and there are myriad cases from this
21 district excluding an expert from talking about non-infringing
22 alternatives that were never disclosed in fact discovery.

23 Now, I suspect ADT may argue, Well, these were
24 non- --these were products that you dropped your infringement
25 allegations on -- actually we indicated that they were dropped

1 before opening reports came in, but in any event, they will
2 say, You dropped your infringement allegations on those so it
3 was fair game for us to turn them into non-infringing
4 alternatives. The problem with that argument is we never
5 accused those [REDACTED] products of infringing the three patents
6 that are left in this case. That is why those products
7 dropped out of the case when we dropped those patents.

8 So ADT during some point in fact discovery should have
9 answered an interrogatory and said, Hey, Fractus, you accused
10 these [REDACTED] products of infringing the '092, the '200, and the
11 '246 Patents, but you don't accuse them of infringing the
12 '887, the '365, and the '103 Patents; therefore, those [REDACTED]
13 patents are non-infringing alternatives to the three patents
14 that are left in this case. They could have done that at any
15 point during fact discovery because we were always not
16 accusing them of infringing the three patents in this case,
17 but they never did that. And so those [REDACTED] products were
18 never accused -- were never identified as non-infringing
19 alternatives; therefore, their expert should not be able to
20 talk about them.

21 So to wrap both of these points together, Judge Payne
22 held in the *Correct Transmission* case that it is too late for
23 an expert to analyze non-infringing alternatives in a rebuttal
24 report. Not only that, but it should be doubly too late for
25 an expert not only to analyze non-infringing alternatives in a

1 rebuttal report, but also to not even bother to identify those
2 non-infringing alternatives until the expert rebuttal report.

3 And so that's our argument with respect to Doctor
4 Feurstein. I think all of those same arguments also apply to
5 the motion with respect to Mr. Andrien, so I won't further or
6 separately address that particular motion.

7 And that's all I've got, Your Honor.

8 THE COURT: All right. I'll hear from the
9 Defendants in response.

10 MS. ACHARYA: Thank you, Your Honor. Ranjini
11 Acharya for the Defendant ADT.

12 I will address the three motions that are issue here in
13 the same order that Fractus' counsel did.

14 A few things that I want to point out in relation to each
15 motion. With respect to Doctor Tentzeris, I think a little
16 bit of context here is important. During fact discovery,
17 Fractus' witnesses told us that they value all the patents in
18 their portfolio equally. When we saw Mr. Mills' opening
19 expert report on damages, he said that [REDACTED]

20 [REDACTED]
21 [REDACTED] So
22 when we saw the opening damages report, that was really the
23 first indication that we had that Fractus views its patent
24 portfolio with different weights ascribed to different
25 patents. And so our damages expert Mr. Andrien went back to

1 the technical experts and talked to them about what value they
2 would ascribe to these patents given their technical
3 expertise. He then sat out those conversations in his report.

4 Now, as Your Honor mentioned, this Court does allow
5 experts to rely on pure hearsay, and so we believe that for
6 Mr. Andrien to have formulated the opinions that he did by
7 relying on these out-of-court discussions that he had with
8 Doctor Tentzeris is not improper and does not render his
9 opinions subject to exclusion.

10 THE COURT: Counsel, the Court has in the past
11 allowed an expert to rely on hearsay, but the Court, to its
12 knowledge, has never allowed an expert to rely on something --
13 some input to their opinion that wasn't fairly testable by the
14 other side prior to trial. So I don't want to confuse hearsay
15 with the Plaintiff's argument here that the way this is
16 structured and the way it is now before the parties and the
17 Court precludes them from having a fair opportunity to test
18 those opinions. What's your response to that?

19 MS. ACHARYA: My response, Your Honor, is that they
20 had that fair opportunity and they chose to forego it. We
21 offered Doctor Tentzeris for deposition. It was not just
22 outlined in the docket control order from the Court, but we
23 actually specifically -- once we saw this motion come in, we
24 offered that deposition. They declined. So they had the
25 opportunity to test these opinions, as they call them, and the

1 substance of those conversations; they declined to take it.

2 And that I think also distinguishes some of the decisions
3 of this Court that they cited in their briefing where the
4 party that was seeking to challenge the opinions took
5 depositions of both the damages expert and the technical
6 expert that the damages expert was relying on. Both of those
7 experts sat for depositions. Here I heard counsel refer to
8 strategic reasons. They made that choice not to take Doctor
9 Tentzeris's deposition.

10 THE COURT: So when an expert like Doctor -- or
11 Mr. Andrien--I guess it's Mr. Andrien--when an expert like him
12 says, You've got to ask Doctor Tentzeris, you've got to ask
13 Doctor Tentzeris, you've got to ask Dr. Tentzeris, and gives
14 that same unenlightening response multiple times, then a party
15 in Plaintiff's position either has to educate the technical
16 expert by deposition as to how they're going to oppose him at
17 trial or they have to suffer the other consequence of not
18 knowing what he's going to say in response to Mr. Andrien's
19 prior statements, You'll have to ask him. I mean, doesn't
20 that put them in somewhat of a Hobson's choice?

21 MS. ACHARYA: Well, I think every deposition of an
22 expert is subject to that Hobson's choice, Your Honor. Every
23 time you take the deposition of an expert you're sharing some
24 of the trial strategy with them in the questions that you ask
25 of that expert. I don't think it's unfair to expect them to

1 take Doctor Tentzeris' deposition and ask him -- the same
2 questions that they put to Mr. Andrien they could have put to
3 Dr. Tentzeris.

4 THE COURT: But isn't it the case that if
5 Mr. Andrien had answered those questions and not just punted
6 on each one of them to Dr. Tentzeris that Plaintiff might not
7 have needed to take the deposition of Dr. Tentzeris if they'd
8 gotten substantive answers from Mr. Andrien about the matters
9 they cared about?

10 MS. ACHARYA: If they were satisfied with his
11 responses, certainly, but Mr. Andrien didn't feel like he was
12 in a position to explain Dr. Tentzeris' reasoning beyond
13 sharing the conclusions that Dr. Tentzeris offered.

14 THE COURT: And if they even had deposed
15 Dr. Tentzeris based on the way this is all coming together,
16 wouldn't they have been in a position of trying to depose an
17 expert about something that's not even in his report?

18 MS. ACHARYA: Yes, Your Honor, because of the way
19 that the --

20 THE COURT: I mean, if the expert is limited to the
21 four corners of their report, why would you depose an expert
22 about something that's not in the expert's report?

23 MS. ACHARYA: Well, I think that Dr. Tentzeris would
24 certainly be precluded at trial from offering opinions beyond
25 his expert report, but given that the conversation was

1 detailed in Mr. Andrien's damages rebuttal, we would have
2 certainly allowed Dr. Tentzeris to be deposed and questioned
3 on that during his deposition. I don't think that's improper
4 for counsel to have asked Dr. Tentzeris those questions.

5 THE COURT: They might could have asked him the
6 questions at deposition, but what good does it do them to get
7 the information from him when they know he can't testify about
8 it because it's not in his report? I mean, how are they going
9 to hold anybody else responsible for his answers and those are
10 answers to questions he can't testify about?

11 MS. ACHARYA: I don't want to tell them how to try
12 their case, Your Honor, but it certainly goes to the
13 credibility of Mr. Andrien in front of the jury when he is
14 asked about those opinions and what he based them on. And so
15 I think it would go to the weight of Mr. Andrien's testimony
16 certainly, but it's not -- I don't support a basis to exclude
17 those opinions altogether.

18 THE COURT: All right. What other argument do you
19 have for me?

20 MS. ACHARYA: With respect to Doctor Feurstein's
21 opinions, so I think we covered many of the same issues with
22 respect to the conversations about the patents themselves. I
23 do want to address Dr. Feurstein's opinions as they related to
24 the non-infringing alternatives.

25 And again, I think here a little bit of context is

1 important just for the benefit of the Court. The expert
2 reports, the opening expert reports went in on March 5th. The
3 Court's ruling on Fractus' options to the claim construction
4 order came down on March 15th. The stipulation dropping those
5 two patents from the case came out on--excuse me--was filed by
6 the parties on March 22nd, so that's when the [REDACTED]
7 products were dropped from the case. And Dr. Feurstein
8 submitted his report on March 26th. At the time that the
9 opening expert reports went in, those products were still part
10 of the case. In discovery ADT had provided an interrogatory
11 response explaining why it didn't believe any of those
12 products infringed the patents that were asserted at the time
13 and provided discovery on those products.

14 So what we have here is a rebuttal opinion that is really
15 a rebuttal opinion to the expert report that went in on March
16 5th. The products fell out of the case in the intervening
17 period, and that based on that Defendant was able to say now
18 these are non-infringing alternatives. And we believe that
19 this is akin to the Court's decision in *Netlist*, which was
20 handed down in January of 2024, where the Court found that
21 non-infringement opinions--sorry; excuse me--non-infringing
22 alternative opinions in a rebuttal report were truly in
23 response to the expert's opening report, and that the
24 plaintiff had been on notice of those products and the
25 series, and so that opinion was not considered untimely

1 and was not stricken.

2 With respect to the *Correct Transmission* case that
3 Plaintiff relies heavily upon, I will note that that decision
4 came out I believe the day after Mr.--excuse me--Dr. Feurstein
5 submitted his rebuttal report and certainly after the opening
6 expert report deadlines had passed. If I read *Correct*
7 *Transmission* correctly, I believe that it may represent a
8 shift in the Court's thinking about when experts should submit
9 expert reports on non-infringing alternatives.

10 Certainly there has been a practice before this Court,
11 including in the *Personalized Media* case, that's 2021
12 WL662237; in the *SESL* case, that was 2012 WL1995514; and in
13 the *Netlist* case to treat non-infringing opinions as properly
14 part of a rebuttal report.

15 Now, if the Court's thinking on that has changed and
16 those opinions should be submitted in an opening report, the
17 *Correct Transmission* case that laid that expectation out for
18 the first time came after the expert deadlines had passed in
19 this case for opening reports.

20 Lastly, with respect to the specific set of [REDACTED]
21 non-infringing alternatives--this was at slide 33 of Fractus'
22 presentation--I think we can set to one side the product that
23 was disclosed by ADT in its interrogatory response.

24 With respect to the remaining [REDACTED] products, these, again,
25 were actually accused of infringing the Fractus patents that

1 are listed there and they were in the opening expert report of
2 the Plaintiff, of Fractus. And in several instances, for
3 example, [REDACTED]
4 those products are sold and are available to ADT's customers
5 and are being installed in the field. So they had full
6 discovery into these products, they were on notice that ADT
7 believed they did not infringe, they included them in their
8 expert report, and then decided after that expert report was
9 issued to drop them from the case.

10 We don't think there's any surprise here. We think that
11 there was adequate notice that these would be non-infringing
12 alternatives, and we believe that Dr. Feurstein properly
13 submitted his opinion on those non-infringing alternatives.

14 THE COURT: What else, counsel?

15 MS. ACHARYA: That's it from me, Your Honor.

16 THE COURT: Is there any follow-up from Plaintiff?

17 MR. GRINSTEIN: Very briefly, Your Honor.

18 THE COURT: All right.

19 MR. GRINSTEIN: I won't comment further on the issue
20 of not putting your opinion in the report. I think we've
21 adequately aired that. Just quick points on the
22 non-infringing alternatives.

23 I believe what the argument that counsel was making was,
24 Well, since you dropped those patents and those products late
25 in the case, therefore, we were justified in waiting until the

1 rebuttal report, but actually as Exhibit 2 to our motion
2 showed, on March the 1st we told Defendant that we were
3 dropping those patents and those products subject to the
4 appeal of the claim construction to Your Honor. And so we
5 would include discussion of the dropped patents in our expert
6 reports out of an abundance of caution just in case Your Honor
7 reversed Judge Payne's claim construction, but they were
8 otherwise dropped. And that was before the opening reports,
9 so they were on notice before the opening report that we're
10 dropping those products.

11 But all that doesn't matter anyway because those products
12 we dropped we never accused of infringing the patents-in-suit.
13 So whether we dropped them or not, they should have been
14 non-infringing alternatives identified by ADT during fact
15 discovery for the three patents that are in suit. Whether we
16 dropped them or not had absolutely no bearing on ADT's burden
17 and duty to identify them as non-infringing alternatives,
18 which they did not.

19 As for the *Correct Transmission* case, I think we've heard
20 a new argument today which is, Well, we couldn't have
21 anticipated the *Correct Transmission* rule because that rule
22 came in the middle of expert report briefing. I guess my
23 response to that is the defendant in *Correct Transmission*,
24 Nokia, I guess could have argued it didn't anticipate the rule
25 in *Correct Transmission* either, but that didn't get Nokia out

1 of having to comply with the rule that was announced in
2 *Correct Transmission*, to the extent it even was a change, and
3 I'm not sure it really was.

4 You know, the Court looked at what non-infringing
5 alternatives were, Judge Payne did, concluded that they were
6 in the nature of affirmative defenses and they should go in
7 opening reports. That rule applied to Nokia when it was first
8 litigated against Nokia in *Correct Transmission* and it should
9 apply here to ADT.

10 Thank you.

11 THE COURT: All right. Thank you, counsel.

12 Let's see if we can take these three related but
13 different motions and cover the entirety of them.

14 All right. With regard to the motion by Plaintiff to
15 strike the opinions of Jeffrey Andrien, Document 142, I'm
16 persuaded that the Plaintiff is in a position--and I can't
17 ascribe direct fault to them for being in this position--that
18 without some relief they are unable to fairly test these
19 opinions in this case.

20 Therefore, I'm going to strike paragraph 46 and note 71,
21 paragraph 70, the following sentences: [REDACTED]

22 [REDACTED]

23 [REDACTED] [REDACTED]

24 [REDACTED]

25 [REDACTED]

1 I'm going to strike paragraph 87 where it says, "I'm
2 unsure how we want to address this" -- I'm sorry. No, I'm
3 going to cut all of paragraph 87, and then paragraph 114
4 starting with the sentence, "As discussed above" through the
5 rest of the paragraph.

6 And then paragraph 117, I'm going to strike the last
7 sentence which says, [REDACTED]

8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]

12 And I'm going to strike paragraph 125 where it says,

13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED] [REDACTED]
17 [REDACTED]
18 [REDACTED]

19 [REDACTED] That portion of paragraph
20 125 is struck.

21 And those are the provisions in Mr. Andrien's report that
22 I'm going to strike.

23 With regard to the motion on Dr. Tentzeris, I'm simply
24 going to deny the motion, but limit the expert to what's in
25 his report. And if I've struck it from Mr. Andrien, Doctor

1 Tentzeris is not going to rely on it.

2 And then with regard to Dr. Feurstein's report, I've
3 considered the *Correct Transmission* case and its analysis,
4 and, quite honestly, counsel, in anticipation of today's
5 pretrial I've had a lengthy discussion with Judge Payne about
6 it so that I could fully understand the nuance of that ruling,
7 and having considered the briefing and the argument, I do find
8 that it is unfair to put forward an opinion regarding a
9 non-infringing alternative for the first time in a rebuttal
10 report that precludes the other side from having a chance to
11 fairly respond to it.

12 So I'm going to strike all [REDACTED] of the proposed
13 non-infringing alternatives, and that includes the [REDACTED]
14 Even though it was disclosed during fact discovery, there was
15 no opinion as to whether or not it constituted a
16 non-infringing alternative until the rebuttal report. And I
17 think -- the issue which is not disclosure or non-disclosure;
18 the issue is the presentation of the opinion for the first
19 time in the rebuttal report. And I'm going to adopt the
20 reasoning and the rationale in the *Correct Transmission* case
21 to the extent it's not previously been adopted by me
22 heretofore. I think it's -- at the end of the day, I think
23 that's what protects a party in this case, the Plaintiff, but
24 could be -- certainly the shoe could be on the other foot in
25 any other case. It protects a party from being unable to test

1 an opinion for the first time when it is relegated to a
2 rebuttal report. And there's no real compelling reason why it
3 should have been relegated to the rebuttal report and there
4 was an opportunity to present it earlier.

5 So I think that should cover the Court's rulings on those
6 three motions.

7 Any questions from either side?

8 MR. GRINSTEIN: No, Your Honor.

9 MS. ACHARYA: No, Your Honor.

10 THE COURT: Okay. Let me ask you this, counsel.
11 Are there other substantive disputed motions between the
12 parties prior to the disputes regarding the motions in limine?
13 I'm trying to make sure we don't miss anything.

14 MR. TRIBBLE: I don't believe so, Your Honor.

15 MR. ZELIGER: Agreed.

16 THE COURT: Then let's turn to the disputed motions
17 in limine.

18 MR. TRIBBLE: Thank you, Your Honor. Max Tribble
19 for the Plaintiff.

20 THE COURT: Just a minute, Mr. Tribble. Let me
21 catch up with you.

22 MR. TRIBBLE: Yes, sir.

23 THE COURT: Okay. Let's take up the Defendant's
24 motions in limine first. And let me hear from Plaintiff as to
25 why it opposes Defendant's motion or proposed Motion in Limine

1 No. 1 dealing with characterizing ADT's overall financial
2 strength market value, revenues, or profits relative to other
3 home security monitoring companies such as Vivint or
4 SimpliSafe.

5 MR. TRIBBLE: Yes, Your Honor.

6 I think, as spelled out in our briefing, I mean, it's
7 very simply this: We're not going to argue or offer that ADT
8 -- the concerns that they express in their motion in limine,
9 it's not what we're going for. But the simple fact of the
10 matter is that I believe both damages experts are going to
11 compare the sales -- [REDACTED]
12 [REDACTED] draw conclusions for it. And so, for
13 example, if ADT's infringing sales are X times those of
14 Vivint, that would be a factor that's fair to point out and
15 to draw conclusions from with regard to how it affects the
16 appropriate damages, and it's as simple as that.

17 THE COURT: All right. Let me hear a response from
18 the Defendant.

19 MS. ACHARYA: Thank you, Your Honor. Ranjini
20 Acharya again for ADT.

21 Our concern here is that there is a line that's being
22 crossed from talking about a comparison of the damages models
23 and a comparison of the two companies overall.

24 In Fractus' opposition they mention that the data bears
25 out that Vivint sales were [REDACTED] units, whereas, [REDACTED]

1 [REDACTED] but that's not what was in their
2 damages expert report.

3 If Your Honor turns to Exhibit 8 of the MIL's report
4 which was in Exhibit 1 to their opposition --

5 THE COURT: I don't have that in front of me,
6 counsel, but you're welcome to use the overhead, the document
7 camera if you want to show me something.

8 MS. ACHARYA: Sure. I'll just summarize it for the
9 Court, and if you'd like to see it I can do that.

10 But essentially Mr. Mills rendered an opinion that he
11 found that the total royalty base for his calculations [REDACTED]
12 [REDACTED] So what we would look to do is hold
13 Mr. Mills and Fractus to the correct comparisons here. If
14 we're going to compare the royalty base, then it should be the
15 royalty base as Mr. Mills calculated where he found the Vivint
16 royalty base was [REDACTED] and he found a roughly
17 similar number for ADT. What we don't want to have happen is
18 for a comparison to be drawn on ADT's overall size relative to
19 Vivint's overall size, and we don't think that that's
20 controversial.

21 THE COURT: Anything further?

22 MS. ACHARYA: That's it, Your Honor.

23 THE COURT: All right. Well, with regard to
24 Defendant's proposed MIL No. 1, I think the comparison between
25 the Defendant and Vivint have enough overlap in this case to

1 where it's a fair comparison.

2 I don't -- I'm going to deny this motion in limine, but
3 in denying it I want Plaintiff to understand I'm not obviating
4 Standard MIL No. 3 in any way, and I'm not giving Mr. Mills
5 leave to go outside the scope of his report. He's still bound
6 by those realities. But as long as he stays within the scope
7 of his report and as long as you don't otherwise violate
8 Standard MIL No. 3, then I don't see -- I think there's enough
9 probative value to allow a fair comparison here, and I'm going
10 to deny the motion in limine.

11 All right. Next is Defendant's proposed Motion in Limine
12 No. 2 that seeks to exclude hypothetical or real scenarios
13 involving criminals cutting physical phone and cable lines to
14 residences.

15 Let me hear the basis of Plaintiff's objection to this.

16 MR. TRIBBLE: Your Honor, to be clear, we don't
17 intend to go into specific stories of incidents, criminal
18 incidents involving ADT customers unless there is some kind of
19 denial by ADT on the stand and there are documents that could
20 come in for impeachment purposes. And so we're not going to
21 try and, I don't know, scare the jury or taint the jury or
22 something that ADT customers have had crimes committed against
23 them. But the fact of the matter is, in emphasizing the
24 importance of cellular communications to its products, ADT
25 describes the cellular capability as life-saving and so forth.

1 They use this in their own marketing, and so just kind of in
2 this general way we think it's fair for us to describe how
3 they market their own products.

4 THE COURT: All right. Let me hear from the
5 Defendant.

6 MS. ACHARYA: Your Honor, Ranjini Acharya for ADT.

7 I think what the Court heard just now is a conflation
8 that we expect to come in and be heavily made at trial, and
9 that is equating the patents-in-suit which deal with very
10 specific geometry of antennas sitting inside these devices
11 with the provision of cellular services more generally.

12 Adt has provided cellular backup in its panels for a long
13 time. It's used cellular services as part of its monitoring
14 even before the priority date of the patents-in-suit. The
15 issue in this case is not about the value of that service to
16 ADT or its customers; it's about these very specific antennas
17 that sit inside the panels -- some of the panels, I should
18 say, that ADT uses, because not all of ADT's panels, not all
19 of ADT's cellular-based services are accused in this case.

20 And so the risk you have whether this evidence comes in
21 as an exhibit, whether it comes in through Mr. Mills'
22 testimony or if it's introduced as cross examination or
23 impeachment evidence is highly prejudicial. This is an
24 emotive line of questioning designed to elicit that kind of
25 emotive response from the jury and, in our view, has very

1 little relevance to the actual technical issues that are at
2 issue in this case. And so on that basis we filed the motion
3 in limine.

4 THE COURT: All right. Thank you, counsel.

5 With regard to Defendant's proposed Motion in Limine 2,
6 I'm going to grant the motion because I think the Court needs
7 to put itself in the posture of being an active gatekeeper
8 here. I want to make it clear to the parties, I think there
9 is relevance to the difference between -- at least to the
10 extent of background information regarding the patents-in-suit
11 there is relevance to the difference between a landline system
12 whose landline could be cut and a cellular system whose signal
13 is not subject to that kind of outward disruption. However,
14 we are not going to have gory pictures or scenes of terrible
15 things that happen to people by criminals who took advantage
16 of the ability to disable a non-cellular system and then
17 proceed to pillage, murder, rape, et cetera. That's not going
18 to happen and I'm-- that's why I am granting this motion.

19 Now, to the extent there is relevance and probative value
20 to the background and the development of the technology that
21 led from the landline basis to a cellular basis, I certainly
22 think that is appropriate background information to get us to
23 the asserted claims of the patents-in-suit.

24 I don't think -- to address Defendant's fear, I don't
25 think this has anything to do with obviating the Plaintiff's

1 obligation and burden of proof to show each and every element
2 of the asserted claims are covered by the asserted and the
3 accused products. It is not a situation where showing that we
4 now have a cellular capability is game over for the Plaintiff;
5 it's anything but that. And Plaintiff is still going to have
6 to put on evidence by a preponderance of the evidence that
7 persuades the jury on the infringement issue that each and
8 every element of the asserted claims is met and covered by the
9 accused products. That's not going to change, and the ruling
10 on this MIL is not going to affect that. But I do think the
11 transition and the development of the technology leading to
12 where we are today and leading up to the specificity of the
13 claims is fair and should come in.

14 But I'm going to be a gatekeeper in a way that avoids
15 anything sensational. I don't see any reason why the
16 Plaintiff should elicit anything more than with the old
17 technology based on the landline it was subject to being cut
18 or interrupted by someone before entering a structure and now
19 with cellular technology that possibility is no longer
20 available. I don't think you need to go any further than
21 that. But to protect against the possibility that some
22 lawyer's exuberance might leave lead them further, I am going
23 to grant this MIL so I can be a gatekeeper here.

24 All right?

25 MR. TRIBBLE: Your Honor, may I ask a clarification?

1 THE COURT: You may. It's better to ask it now than
2 in the middle of the trial.

3 MR. TRIBBLE: Yes, Your Honor.

4 And so, for example, on our exhibit list is PX 17, which
5 is a marketing document of ADT. I'd like to show it, but it's
6 been marked 'attorneys' eyes only' by ADT.

7 Take that down.

8 And so I guess we would have to briefly seal the
9 courtroom, or I could hand it up and just --

10 THE COURT: Let me say this, counsel. I am a very
11 firm believer in we do this in a compartmentalized basis and
12 I'm going to rule on the disputed MILs now. Having given you
13 that guidance on this and the other disputed MILs, I'm then
14 going to turn you loose to meet and confer with the other side
15 about the opposed and disputed exhibits. And if this is one
16 that survives that process and you're still unable to agree on
17 whether it should come in or come out, I'll deal with it
18 later, but I'm not going to take it up right now.

19 MR. TRIBBLE: Yes, Your Honor.

20 THE COURT: Okay.

21 All right. Let's go to Defendant's proposed MIL No. 3.
22 This is regarding the [REDACTED].

23 Does anybody have any doubt that [REDACTED] is out of the
24 case for both sides 100 percent?

25 MR. TRIBBLE: No, Your Honor.

1 MR. ZELIGER: Your Honor, I do have just a question
2 of clarification.

3 THE COURT: What's that?

4 MR. ZELIGER: There are a number of other offers
5 that were made in reference to the report that are not just
6 [REDACTED] and are not implicated at all by the motions or
7 briefing on that point, and I just want a clarification from
8 the Court that its ruling doesn't reach the other offers that
9 were not accepted and not otherwise discussed today.

10 THE COURT: Does anybody have a lack of
11 understanding as to where the [REDACTED] starts and
12 ends? Because that's what I'm ruling on.

13 MR. ZELIGER: No.

14 MR. NELSON: No, Your Honor.

15 THE COURT: Then [REDACTED] is out, but I'm not
16 addressing anything that's not [REDACTED].

17 MR. ZELIGER: Very well. Thank you, Your Honor.

18 THE COURT: I'm going to grant Defendant's MIL
19 No. 3, just to be consistent with what's previously been
20 said--no presentation or evidence regarding the [REDACTED]
21 [REDACTED]

22 That brings us to disputed Plaintiff's MIL No. 1. This
23 has to do with patents or claims no longer asserted against
24 ADT except in the context of arguments regarding comparability
25 of licenses.

1 What's the basis of Defendant's objection to this? Let
2 me hear from Defendants first.

3 MS. ACHARYA: Thank you, Your Honor. Ranjini
4 Acharya again for ADT.

5 And I think with respect to the carve-out there may be
6 room for agreement here, but we just need a little bit of
7 clarification.

8 The reason that the '092 and the '200 Patents, which were
9 originally asserted but dropped from the case against ADT,
10 we've included that in our exhibit list because ADT's experts
11 address those patents in their rebuttal expert reports. And
12 in -- specifically, examples are ADT's damages expert relied
13 on the conversations with Doctor Tentzeris to allocate
14 different values to the six patents that Fractus had asserted.
15 Now, I understand the Court has made some rulings on that, but
16 we oppose this motion because our understanding, based on some
17 of the other guidance from this Court in other cases, is that
18 if there are dropped patents that still are relevant to other
19 issues in the case, including damages, then they should be
20 allowed and they're not subject to the Court's standing order.
21 So we would like to be able to have these and address them
22 with the exhibit list later, but we would at least like to be
23 able to reference these two patents even if we're precluded
24 from referring to the fact that they were initially asserted
25 and then dropped. But we need to at least be able to make

1 reference to them as part of the damages rebuttal.

2 THE COURT: I can't imagine any basis on when I
3 would let a party say these were originally asserted but have
4 now been dropped.

5 Let me hear a response from the Plaintiff.

6 MR. TRIBBLE: Your Honor, our position is that to
7 the extent they want to say in comparing the Vivint license to
8 the number we -- Mr. Mills opines on or numbers relating to
9 damages from ADT, if they want to say, Well, the Vivint
10 license [REDACTED]
11 [REDACTED], we have no
12 objection to that. What we object to is, first of all, any
13 mention that we dropped any patents, that we dropped the
14 assertion of any patents against ADT; and then, you know,
15 other than that, we note that the '246 Patent is on their
16 exhibit list but it wasn't in -- it was never asserted against
17 Vivint. We just can't imagine why that could possibly be
18 relevant since it's not being asserted against ADT either.
19 And so those are our concerns.

20 THE COURT: All right. Well, let me say this. To
21 the extent there's been anything raised, asserted, and now has
22 been dropped, surrendered, abandoned, and is no longer an
23 active matter on which issue is joined going into this trial,
24 that past history is excluded and is not going to be
25 mentioned. And I think that's already covered by the Court's

1 standard MILs.

2 To the extent there's any room for doubt, I'm going to
3 grant this MIL to the extent it excludes anything that's been
4 previously asserted but has now been dropped. That doesn't
5 mean that I am somehow through this limine motion
6 circumscribing an expert's report or their opinions or what
7 they may be talking about. I'm not doing that, I'm not going
8 to do that, and limine practice is not an opportunity to
9 *Daubert* a report or an expert's opinions. So -- and those
10 things are not inconsistent.

11 And there may be patents from the [REDACTED] agreement that
12 are relevant to the damages analysis, but to the extent those
13 are patents that were previously asserted and dropped, that
14 information is precluded. But that doesn't necessarily
15 preclude any probative relevance to the issues before the
16 jury.

17 And I think everybody can understand this, but let me
18 just ask for my own peace of mind, does anybody doubt what I'm
19 saying here or have any questions about that?

20 MR. TRIBBLE: No, Your Honor; we understand.

21 MS. ACHARYA: No, Your Honor.

22 THE COURT: Okay. So this is granted with the
23 understanding that it doesn't preclude the relevance or
24 probative value of matters that may have been previously
25 asserted but dropped, except it expressly excludes any

1 reference to the fact that they were previously asserted and
2 now have been dropped.

3 Okay. That brings us to Plaintiff's proposed MIL
4 No. 2 --

5 MR. TRIBBLE: We dropped that one, Your Honor.

6 THE COURT: That's out. It's withdrawn. It's moot
7 anyway in light of the Court's ruling.

8 Is MIL No. 3 still in active dispute here?

9 MR. TRIBBLE: Well, what my outline says, this rises
10 or falls with the Court's prior rulings, and we believe it
11 does, and so we believe this should be granted for those same
12 reasons--there's no supporting expert testimony.

13 THE COURT: Does Defendant dispute that this rises
14 or falls with the earlier ruling?

15 MS. ACHARYA: Not as it relates to expert testimony,
16 Your Honor, but we do believe that the testimony from ADT's
17 fact witnesses --

18 THE COURT: Counsel, please go to the podium.

19 MS. ACHARYA: I'm sorry. I apologize, Your Honor.

20 THE COURT: That's all right.

21 MS. ACHARYA: We are understanding the Court's
22 ruling as it relates to expert testimony on non-infringing
23 alternatives. We understand that's out as a result of the
24 Court's rulings today. We do want to make sure that the
25 factual testimony that ADT's witnesses provided in discovery

1 on the non-infringing alternatives that were identified
2 through the course of discovery, that we're not precluded from
3 presenting that evidence at trial.

4 THE COURT: What probative purpose would you be
5 presenting that if there's not an ultimate opinion that this
6 is or is not a non-infringing alternative? What other
7 probative purpose would it serve?

8 MS. ACHARYA: We think it's important for the jury
9 to understand that not every aspect of ADT's business is being
10 accused of infringement here; that in the hypothetical
11 negotiation ADT would have had -- has and would have had these
12 alternatives available to it, and ADT's witnesses have
13 testified to that effect.

14 THE COURT: Well, I'm trying to understand where
15 you're coming from. We're not somehow going to get through
16 the back door that this is a non-infringing alternative but
17 we're not going to call it a non-infringing alternative, we're
18 not -- this is not a situation where as long as you don't call
19 it a duck it's okay even though it walks like a duck, it
20 quacks like a duck. It's not going to come in for any purpose
21 related to non-infringing alternatives. If there is another
22 probative purpose unrelated to that for which it might be
23 offered to the jury, then I'm open to that, but I'm asking you
24 to clarify for me what that might be.

25 MS. ACHARYA: Sure. And the response to that, Your

1 Honor, is, as I mentioned earlier, the accused technology in
2 this case is not the provision of cellular services. ADT has
3 done that for a long time, even before the patents-in-suit.
4 And so the example that was given during deposition is an
5 example of a device that allowed ADT to offer cellular
6 connectivity to its customers via a product that's not accused
7 of infringement in this case, and it's important to place that
8 into context because it places the scope of the inventions
9 here in context.

10 THE COURT: Let me just say this, counsel. I'm
11 going to grant Plaintiff's MIL No. 3, and to the extent you
12 believe that that testimony can be presented in a way that
13 doesn't either directly or indirectly by statement or
14 implication raise the issue of a non-infringing alternative,
15 then I'm not going to preclude you from presenting it, but I
16 am going to require that you approach and get leave before you
17 do it.

18 MS. ACHARYA: Understood.

19 THE COURT: We need -- you know, it's much better
20 for me to determine that there is or isn't a basis not related
21 to the concept of non-infringing alternatives for which this
22 could come in or should stay out. It's much better for me to
23 do that at the bench than for, you know, it to come in in the
24 middle of the trial and then I hear speeches about a bell that
25 can't be unrung or a skunk that can't be taken out of the jury

1 box and still not smelled.

2 I'm going to grant the motion in limine. I'm not going
3 to preclude outright -- out of hand today that there is some
4 basis that doesn't relate to the concept of a non-infringing
5 alternative for which this might be probative, but you're
6 going to have to show me before you present it.

7 MS. ACHARYA: Understood. Thank you, Your Honor.

8 THE COURT: Okay. All right. That brings us to --
9 Plaintiff's MIL No. 3 is granted.

10 Plaintiff's MIL No. 4 seeks to preclude evidence or
11 testimony that invokes or relates to claim construction,
12 including tech tutorials.

13 What's the basis of Defendant's objection to this?

14 MS. ACHARYA: I shouldn't have left the podium, Your
15 Honor. I apologize. Ranjini Acharya again for ADT.

16 The relief stated here is fairly broad, but in the course
17 of briefing I think the concern that Fractus had is fairly
18 narrow and that concerns the testimony of one of its witnesses
19 in a deposition when she was asked about non-accused ADT
20 hardware, products that don't infringe or weren't asserted to
21 infringe the Fractus patents. She was asked, "Do you have any
22 personal knowledge of products that were analyzed but not
23 accused?"

24 And she said, "Well, for example, in the tutorial for
25 Fractus we point to some ADT antennas that have external

1 antennas." And then later in that same -- in that same
2 deposition, same day, she returned to the topic unprompted
3 without a question pending while the questioning attorney was
4 marking another exhibit came back and said, "I would like to
5 clarify my previous response. I'm referring to the antennas
6 that appear in the tutorial shown by Fractus."

7 So what we have here is a party admission that external
8 antennas that were shown in the tech tutorial are not covered
9 by the patents-in-suit. This is not a claim construction
10 argument. Everybody agrees in this case, including the
11 technical expert, that products with external antennas don't
12 infringe the patents-in-suit. We're not trying to reargue any
13 claim construction position, but we do want to be able to
14 fairly put that evidence in front of the jury. And so the
15 reason we've opposed this motion is we don't want an end-run
16 around that ability just because it was made in reference to a
17 tech tutorial.

18 THE COURT: All right. What's Plaintiff's response?

19 MR. TRIBBLE: And so, Your Honor, in part this is
20 covered by the prior motion in limine regarding non-infringing
21 alternatives, but, in addition, it does relate to claim
22 construction. I mean, clearly the tech tutorial was submitted
23 to the Court as part of the claim construction process, and we
24 believe it would be unfair to play testimony referring to the
25 tech tutorial.

1 And again, at the end of the day, you know, there's no
2 sponsoring or supporting expert who's going to talk about
3 non-infringing alternatives, and so this defense fails as a
4 matter of law. So it's just going to be confusing and
5 distracting to the jury and highly prejudicial to Fractus on
6 this point that at the end of the day must fail as a matter of
7 law.

8 And, you know, in addition, even though it was a Fractus
9 witness, it is still a way to back door in testimony from a
10 fact witness to, you know --

11 THE COURT: This is coming from the deposition of
12 Carmen Borja. Is that right?

13 MR. TRIBBLE: Borja.

14 THE COURT: Borja. So we're talking about
15 deposition designations, not a live witness.

16 MR. TRIBBLE: That's true, Your Honor.

17 THE COURT: Is that the only anticipated avenue from
18 which this would present itself?

19 MR. TRIBBLE: I believe so.

20 THE COURT: Why is that not something that the
21 Court can wait until I see the specific designation and
22 counterdesignation that's disputed and I can look at the
23 actual question and answer and give you a more accurate
24 response at that time?

25 MR. TRIBBLE: I believe that the Court could.

1 THE COURT: Is Defense counsel anticipating any of
2 this coming from anything other than this one deposition
3 witness?

4 MS. ACHARYA: No, Your Honor.

5 THE COURT: Okay. Well, I'm going to deny the
6 motion in limine, but I'm going to serve as a gatekeeper when
7 I take up disputed designations or counterdesignations for
8 this particular deposition witness.

9 MR. TRIBBLE: Yes, Your Honor.

10 THE COURT: All right. That brings us to
11 Plaintiff's asserted MIL No. 5, which is disputed. This has
12 to do with failure to mark and whether or not the threshold
13 required by *Arctic Cat* has been met.

14 I don't know why this is coming to me as a motion in
15 limine. I don't know why this wasn't presented as a
16 substantive motion for summary judgment, because it seems to
17 either open or close the issue of the marking defense and
18 that's really not what limine practice is about.

19 MR. TRIBBLE: I understand, Your Honor. In this
20 particular case this testimony shouldn't come in because they
21 should be bound to what they put forth in discovery, and
22 specifically in this particular case. We asked them in an
23 interrogatory to state in detail the factual basis --

24 THE COURT: I understand your argument. I
25 understand why you say that the threshold required by *Arctic*

1 Cat hasn't been met; I just don't understand why this is a
2 disputed limine; why Plaintiff didn't move for a summary
3 judgment order that the initial burden placed on the Plaintiff
4 under *Arctic Cat* has not been met, and, therefore, the marking
5 defense is not available to the Defendant.

6 I don't know why -- because this is truly a substantive
7 issue. This is not some procedural matter or it's not a
8 matter of how to present evidence or -- you know, it's not a
9 402, 403 argument, which is what most disputed limines are
10 about; this is a substantive argument that, if granted, would
11 effectively preclude a defense otherwise available to
12 Defendant. I just don't know why it's before me as a MIL.

13 MR. TRIBBLE: Well, Your Honor, if they had
14 identified any basis, any -- under *Arctic Cat* Defendant has
15 an initial burden that it must satisfy first before --

16 THE COURT: I understand that.

17 MR. TRIBBLE: And their burden is to identify,
18 quote, particular products, end quote, that --

19 THE COURT: And your argument is they haven't
20 identified any particular products; therefore, they haven't
21 met the burden, and, therefore, there should be no addressing
22 the marking issue. But why is that an appropriate limine
23 motion? Why isn't that a substantive summary judgment issue
24 that as a matter of law there is no material dispute of fact
25 that there was no identification of affected products;

1 therefore, the burden imposed by *Arctic Cat* hasn't been met
2 and I should grant summary judgment to exclude the marking
3 defense? That's how this should have been brought to the
4 Court.

5 I just don't know why it's like it is. And every time I
6 ask you why is it coming to me this way, you're telling me the
7 substance of your argument. I understand the substance of the
8 argument; I just don't understand the appropriateness of the
9 delivery mechanism.

10 MR. TRIBBLE: So the other reason, Your Honor, is
11 that if they had met their burden and identified any
12 particular product, then during discovery we would have been
13 allowed to analyze that product and say no. That product is
14 not covered by the patents and, therefore, there was no
15 marking requirement. But we didn't get that opportunity
16 because they never identified any particular products during
17 discovery.

18 THE COURT: What else?

19 MR. TRIBBLE: Nothing, Your Honor.

20 THE COURT: Let me hear from the Defendant.

21 MS. ACHARYA: Your Honor, Ranjini Acharya again for
22 ADT.

23 For this MIL I think we'll rest on the briefs. We agree
24 with Your Honor about the mechanism by which this motion in
25 limine could have been brought.

1 THE COURT: Well, let's forego the mechanism issue.
2 Let's talk about the substantive issue. Do you dispute that
3 there's been no identification of particular products that
4 would meet the burden imposed by *Arctic Cat*?

5 MS. ACHARYA: We do, Your Honor. We think there is
6 a dispute that if it had been brought as a summary judgment
7 motion, we would have opposed on the basis of factual
8 disputes. We believe that Fractus' witnesses have testified
9 that their license agreements don't impose a marking
10 requirement on their licensees.

11 [REDACTED]
12 [REDACTED] But we believe that
13 the products that the licensees then produce with a
14 portfolio-wide license in some instances bear no indicia of
15 marking and are not subject to a marking requirement, so we
16 believe that there are products. The [REDACTED] accused products
17 would be one example. There is also a license agreement --

18 THE COURT: I'm not interested in products that
19 don't have a marking requirement; I'm interested in products
20 that do have a requirement to mark and then there's a failure
21 to mark. Have you identified products that are subject to the
22 marking requirement?

23 MS. ACHARYA: No, Your Honor, because the license
24 agreements don't impose a marking requirement.

25 THE COURT: So you're not asserting a separate

1 defense under § 287 beyond the license agreements.

2 MS. ACHARYA: That's correct.

3 THE COURT: So there is no formal marking defense by
4 Defendants in this case--is that right?--based on § 287.

5 MS. ACHARYA: Our position has been that because the
6 license agreements don't impose a marking requirement, § 287
7 hasn't been met because Fractus doesn't require its licensees
8 to mark products that are licensed under the license
9 agreements. So, for example, Fractus has asserted that [REDACTED]

10 [REDACTED] [REDACTED]
11 [REDACTED] [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]

15 THE COURT: Let me see if I can ask this the way I
16 want to.

17 The provisions of § 287 of the Patent Act, commonly known
18 as the marking requirement, the marking statute, impose a
19 limitation on the damages period that a plaintiff can recover
20 where it fails to mark a product that is otherwise required to
21 be marked, and *Arctic Cat* requires that the defendant, to take
22 advantage of that statutory defense, must first identify
23 particular products which are subject to the marking
24 requirement, and then having met that burden, the burden
25 shifts to show that they either were marked or some other

1 defense.

2 All I'm hearing about is there's no marking requirement,
3 so is there or is there not a § 287 defense that would curtail
4 the damages period asserted by the Plaintiffs in this case, in
5 your view?

6 MS. ACHARYA: Let me answer that question directly.
7 We have not identified a product that is not marked in this
8 case.

9 THE COURT: Then why would it be appropriate to
10 preclude this limine that would stop mentioning of -- would
11 preclude introducing evidence about a failure to mark a
12 product?

13 MS. ACHARYA: And our position has been--and maybe
14 I'm hearing from Your Honor that this is not a persuasive
15 one--but our position has been that Fractus requires its
16 licensees to enter into a license agreement based on
17 allegations that those licensees--for example, [REDACTED]
18 [REDACTED]--are practicing its patents, they then get a license,
19 they continue to market and sell those products that were
20 previously accused of infringement, those products are then
21 not marked, and they're not required to be marked.

22 THE COURT: Okay. Well, let me say this. To the
23 extent, notwithstanding the fact that it's somewhat irregular
24 that this issue is brought to the Court through a disputed
25 motion in limine, notwithstanding that, the guidance from the

1 Federal Circuit in *Arctic Cat versus Bombardier Recreational*
2 *Products* is pretty clear that without some notice of what
3 market products the Defendant believes required marking, that
4 the Plaintiff's universal products for which it would have to
5 establish compliance would be unbounded, and reference to a
6 license agreement does not, in the Court's view, meet the
7 requirement of providing the kind of particular notice
8 targeted to specific products that *Arctic Cat* requires.

9 Therefore, I'm going to grant this motion in limine based
10 on Defendant's failure to identify specific products that
11 would then shift the burden back to Plaintiff.

12 MS. ACHARYA: Thank you, Your Honor.

13 THE COURT: All right. Mr. Tribble, I would suggest
14 in the future this come to the Court as a summary judgment
15 motion.

16 MR. TRIBBLE: Absolutely, Your Honor.

17 THE COURT: All right. That should dispose of all
18 the disputed limine issues.

19 Mr. Ward, you're at the podium.

20 MR. WARD: I'm at the podium.

21 THE COURT: Tell me why.

22 MR. WARD: So good morning, Your Honor.

23 It's a MIL issue, Standing MIL 13, the Court's standing
24 MIL regarding other litigation. I just wanted to clarify with
25 the Court, we don't want to go into litigation of ADT. We

1 would certainly approach the bench before we did that. But
2 during voir dire I would like to inform the jury about the
3 fact that Fractus has sued other companies, and they're going
4 to learn about that with respect to license agreements that
5 will be introduced into evidence--the Vivint license, and I
6 know the Defendants have some license agreements that they
7 want to refer to that are a result of the litigation. And I
8 just wanted to clear that with the Court that I'd like to voir
9 dire the jury panel about that.

10 And also you'll see in the exhibits that come up, I don't
11 really think there's a dispute about what the experts have
12 relied upon. So we'd ask for an exception to that MIL that we
13 could refer to that during voir dire and during the course of
14 the case with respect to the litigations that are relevant to
15 damages, and I guess some background of Fractus as well.

16 THE COURT: Can you be more specific about what
17 particular prior litigations you are going to want to refer
18 to?

19 MR. WARD: I believe that the litigation with
20 Samsung -- I think the Samsung license will be in evidence, or
21 those negotiations, what happened with respect to Fractus.
22 That was the first litigation that they were involved in, and
23 I think that forms to the basis of some of the discounts that
24 Mr. Mills will talk about with respect to license agreements.

25 THE COURT: And you believe those licenses or other

1 exhibits are going to disclose on their face that they're a
2 result of existing litigation between the parties?

3 MR. WARD: Yes, Your Honor.

4 THE COURT: What's Defendant's position on this?

5 MR. ZELIGER: Your Honor, Michael Zeliger for ADT.

6 I don't think we have any objection to that as
7 characterized with respect to the Vivint litigation.

8 The Samsung, though, was an entirely different set of
9 patents, and I'm not sure referencing the litigation itself
10 during voir dire is appropriate. If the license itself, the
11 Samsung license comes in and it has a reference to it, that's
12 okay, but we don't see the value in previewing that during
13 voir dire.

14 THE COURT: All right. Let me say this. Based on
15 this exchange with counsel for both sides, I'm going to grant
16 leave to Plaintiff's counsel during the jury selection process
17 to reference other litigation that is called out and evidenced
18 by pre-admitted exhibits that the Court will have pre-admitted
19 in advance of trial. If it is not supported by and referenced
20 within a pre-admitted exhibit, then I'm not granting leave
21 unless I grant leave at the time. But in advance of that, if
22 it relates to prior litigation, that's clearly borne out and
23 supported by documentary evidence that the Court's
24 pre-admitted and is expected to be shown to the jury during
25 the trial, then I'll grant an exception to Standard MIL

1 No. 13.

2 MR. WARD: Understood, Your Honor. Thank you.

3 THE COURT: All right. Is there anything else save
4 and except for disputes regarding the pre-admission of
5 exhibits that needs to be taken up?

6 MR. TRIBBLE: No, Your Honor.

7 MR. ZELIGER: Nothing from the Defendant, Your
8 Honor.

9 THE COURT: All right. Well, it's 10 minutes until
10 12:00 noon, counsel. We're going to recess for lunch. I want
11 you to spend -- I don't mind if you have something nourishing,
12 but I want you to work on these exhibits. You've gotten the
13 Court's guidance by way of my rulings on the substantive
14 motions; you've gotten my guidance by way of the rulings on
15 the disputed motions in limine; you should have what you need
16 to fairly and clearly delineate what ought to be pre-admitted
17 as an exhibit in this case following the constraints and
18 structure of the Court's standing order on the pre-admission
19 of exhibits in a case like this.

20 I don't mind if you leave the building, but I want you
21 back here not later than 1:00, and I want you actively meeting
22 and conferring about these disputes and applying the Court's
23 guidance with regard to the pre-admission of exhibits. You're
24 welcome to use the courtroom. I don't have anything scheduled
25 in here. You're welcome to meet in the jury room or the

1 attorney conference room. But I want you working after lunch
2 diligently on these exhibits, and hopefully you can resolve
3 any prior disputes in light of the guidance I've given you.
4 If not, I want them substantially narrowed and targeted so
5 that I can give you direct guidance if that's necessary.

6 And I will have my staff check with you some place in the
7 courthouse. I assume you'll be one of those three places.
8 We'll find you. I'll have my staff check with you on any
9 progress that you're making beginning after the lunch break.

10 Questions?

11 MR. TRIBBLE: No, Your Honor.

12 MR. ZELIGER: Nothing, Your Honor.

13 THE COURT: All right. We stand in recess for
14 lunch.

15 (Lunch recess.)

16 THE COURT: Be seated, please.

17 Counsel, where are we on disputed exhibits to be
18 pre-admitted?

19 MS. ACHARYA: May it please the Court. Ranjini
20 Acharya for ADT.

21 And we were able to meet and confer and reach agreements
22 on all but one of the categories of exhibits. I'm happy to
23 read those into the record, if that's helpful, or send a joint
24 email to the Court with the --

25 THE COURT: Why don't we do it both ways. Why don't

1 you read into the record what your understanding is, I'll
2 confirm it with Plaintiff, and then we'll follow it up with
3 documentation.

4 MS. ACHARYA: Sounds good.

5 With respect to category 1, these are Fractus exhibits
6 PX 06, PX 03, and PX 11. ADT's agreed to drop its objections
7 to PX 6, and Fractus has agreed to withdraw PX 3 and PX 11.

8 With respect to the second category of exhibits, ADT is
9 dropping its objections to PX 1 and PX 4. We will be arguing
10 the remainder today. And we also would like to add PX 29 to
11 this category. It was overlooked while the parties were
12 preparing their joint submission.

13 For category 3, ADT drops its objections to PX 24 and 25.
14 PX 26 is withdrawn by Fractus with respect to that exhibit.

15 Turning to the ADT exhibits, category 4 in our list, the
16 ADT exhibits listed there DPX 1, DPX 2, DPX 3, DX 1, 2, 3, 4,
17 5, 6, 7, 8, 9, 10, 11, 17, 22, 23, 24, 25, and 26, ADT is
18 withdrawing all of those exhibits.

19 THE COURT: Withdrawing the exhibit; not the
20 objections. Right?

21 MS. ACHARYA: Correct.

22 THE COURT: Okay.

23 MS. ACHARYA: With respect to ADT exhibits 12, 13,
24 14, 20, and 21, ADT is withdrawing those exhibits. In that
25 category remaining is DX 18, and Fractus has agreed to

1 withdraw its objections to that exhibit.

2 With respect to the last category on the list, these are
3 ADT exhibits DX 15 and 16. ADT has agreed to withdraw these
4 exhibits.

5 THE COURT: All right. Does Plaintiff have any
6 objection or correction with regard to the rendition offered
7 by Defense counsel?

8 MR. SMYSER: In general, no, Your Honor. I would
9 just note for Plaintiff's Exhibit 26, which is simulations of
10 some antennas, the parties agreed that TO the extent it was
11 referenced in an expert report, that can be shown to the jury
12 as part of a demonstrative during trial. And I believe the
13 same agreement was reached with respect to Defendant's
14 Exhibits 12, 13, 14, 20, and 21.

15 THE COURT: But not otherwise admitted as a
16 pre-admitted exhibit.

17 MR. SMYSER: That is correct, Your Honor.

18 THE COURT: Does that comport with your
19 understanding?

20 MS. ACHARYA: Yes, that's right, Your Honor.

21 THE COURT: All right. So let's focus on what's
22 left.

23 This is PX 1 -- let's see. PX 1 and 4 are no longer at
24 issue in this category. Is that right?

25 MS. ACHARYA: That's correct, Your Honor.

1 THE COURT: So that leaves us PX 7 through the
2 remainder of this category. And the basis of the objection is
3 primarily lack of authentication?

4 MS. ACHARYA: That's correct, Your Honor. We're
5 also adding PX 29 to this category. The primary objection
6 here is lack of authentication, and attendant to that there is
7 some hearsay as well, but I can start with the authentication.

8 THE COURT: All right. Do we have a respective
9 exemplar for this group?

10 MS. ACHARYA: Yes, Your Honor.

11 This is one example. I identified two representative
12 examples from this category. This is one. It's an article
13 that was published online by CNET publication. This is not
14 something that's been produced in this case by either party.
15 It's a third-party article that cannot be authenticated by any
16 witness.

17 THE COURT: How is this identified? This is PX --
18 or proposed PX what?

19 MS. ACHARYA: I'm sorry. This is PX 13.

20 THE COURT: Okay.

21 MS. ACHARYA: And there are a number of third-party
22 articles like this listed in this category. They come from
23 various public websites, but they're not ADT documents nor
24 Fractus documents nor produced by third-party subpoena in this
25 case.

1 THE COURT: And they're not referenced in any
2 expert's report. Is that correct?

3 MS. ACHARYA: I don't believe these are. There was
4 a separate batch of documents that we've now reached agreement
5 on with respect to the expert reports.

6 THE COURT: All right. Why don't you scroll through
7 the balance of the document so I can look at it slowly.

8 All right. Is there more to it?

9 MS. ACHARYA: There is. It goes in -- there is some
10 intervening advertising, and then it goes on with some Q&As.

11 THE COURT: What's Plaintiff's response to this
12 objection?

13 MS. TUOHY: Good afternoon, Kelsey Tuohy for the
14 Plaintiff.

15 This exhibit actually was cited in expert report.
16 Mr. Mills cites it in footnote 333 of his report. But we
17 think that there is sufficient evidence that this document is
18 what it purports to be. It's a periodical seen as a media
19 publication that reports on consumer electronics, and that it
20 should be authenticated as such.

21 THE COURT: Are you referencing any particular
22 authority under the rules of evidence or procedure, or just
23 think it ought to be okay?

24 MS. TUOHY: Under 902 -- Federal Rule of Evidence
25 902(7), periodicals are self-authenticating documents.

1 THE COURT: You said 902(7)?

2 MS. TUOHY: Yeah, I believe it's 902(7). (6);
3 902(6).

4 THE COURT: Okay. And I gather you don't factually
5 dispute the fact that these were not produced -- affirmatively
6 produced by either side during discovery in the case.

7 MS. TUOHY: No.

8 THE COURT: Well, counsel, let me ask you this.
9 Under this definition, the National Enquirer is a publication.
10 So I'm checking out at the grocery store and I see an article
11 about aliens taking over the body of a Supreme Court justice.
12 And I supposed to accept that as probative and -- I mean,
13 there's a wide variety of publications out there; everything
14 from the *American Bar Journal* to the *National Enquirer*. Why
15 does this fall in that spectrum that would be closer to
16 something recognized as reliable as opposed to the other end
17 of the spectrum?

18 MS. TUOHY: If you look on the CNET website, it also
19 holds itself out to have editorial standards. It's a
20 subsidiary of CBS. But I also think that this is an issue for
21 authentication about whether this document is what it purports
22 to be and not necessarily to the extent they dispute the truth
23 of the statements made in the article. That's an issue
24 separate from the authentication question.

25 THE COURT: What's Defense counsel say as to that?

1 MS. ACHARYA: Your Honor, as I mentioned, we do have
2 some concerns -- hearsay concerns about the subject of this
3 article as well, especially in light of what we talked about
4 earlier today with respect to the motions in limine where
5 there's statements being made about landline connections being
6 cut. The witnesses are free to testify as they wish, but we
7 have some real concerns about these documents coming in as
8 pre-admitted exhibits and into evidence here.

9 THE COURT: Why don't you do this. Why don't you go
10 to your next exemplar and let me look at it.

11 MS. ACHARYA: Sure. The other example is a form
12 10-K that was submitted by Vivint to the Securities and
13 Exchange Commission. Again, this is not an ADT document, it
14 wasn't produced in the case, it doesn't bear any Bates label.
15 We don't think that this is appropriate to bring in. We think
16 there's an authentication issue. We also worry that it's
17 going to be accepted by the jury as true on its face for the
18 contents of the document, and so this is part and parcel of
19 our concerns with this category of objections.

20 If Your Honor would like to see more of this document, I
21 can scroll through, but this gives you an indication of what
22 it is.

23 THE COURT: So are we really fighting about the
24 authenticity or are we fighting about the reliability, or is
25 it both?

1 MS. ACHARYA: It's both, Your Honor. We categorized
2 it primarily as a lack of authentication issue because none of
3 these documents came in through a party in this case, but
4 there are also attendant concerns if they do come in about the
5 reliability of the statements and the risk that the jury will
6 accept these statements as true.

7 THE COURT: I haven't looked at the criminal statute
8 in a long time, but, as I recall, there are very severe
9 penalties for making a factual misrepresentation to the
10 Securities and Exchange Commission in form 10-K. It seems to
11 me inherently more reliable than something like a periodical
12 that anybody can publish on the internet, whether they have an
13 established description base or whether they're just a
14 one-person operation.

15 Why is this in the same category as the earlier exemplar?

16 MS. ACHARYA: Well, one of the reasons why we
17 categorized this for the Court's benefit under authentication
18 was precisely that. The primary concern is none of these
19 documents can be authenticated. Certainly if this is
20 something Vivint submitted to the SEC, we would have to assume
21 that they were truthful in making that submission, but there
22 is no witness in this case that can confirm that this is, in
23 fact, a Vivint 10-K filing.

24 THE COURT: Let me ask you this. Is there anything
25 about the version of it that is being offered at this point in

1 this case that shows it actually was submitted to the SEC? Is
2 this a -- is there a file marked copy? Is there a -- anything
3 indicating that it's factually a true representative of what
4 was submitted to and filed with the agency?

5 MS. ACHARYA: Not to my knowledge. Fractus' counsel
6 will correct me if I'm wrong. I don't believe this was a
7 deposition exhibit with any witness in the case. I don't
8 think it's come in in any other way.

9 THE COURT: Can Plaintiff's counsel represent that
10 this is a true and correct copy of what was actually filed
11 with the SEC, or is this a draft out of somebody's file and it
12 got substantively altered before an actual filing was made?
13 There could be a big difference there.

14 MS. TUOHY: Kelsey Tuohy for the Plaintiff.
15 We obtained this file from the SEC's website EDGAR, and
16 if there is any doubt as to that, Defendant's counsel is also
17 free, or the Court, to check the EDGAR website themselves.

18 THE COURT: Okay. You didn't get this from Vivint;
19 you got it from the SEC's website?

20 MS. TUOHY: Correct.

21 THE COURT: Okay. Let me ask this question. The
22 SEC filing, this PX 19, am I correct that the remainder of the
23 identified exhibits in this category pretty clearly fall
24 either into the PX 13 area or the PX 19 area? Or are there
25 other ones that are different and not fairly covered by these

1 two exemplars?

2 MS. TUOHY: We've agreed that these two are
3 exemplars of the whole category.

4 THE COURT: Well, the reason I ask this question is
5 my inclination is to exclude PX 13, the online, quote unquote,
6 news article, but my inclination is to pre-admit PX 19,
7 because, quite honestly, a filing from the SEC's website is a
8 much more reliable and acceptable document than something that
9 purports to be a news article just floating out there in the
10 ether. To me there's a significant disparity between these
11 two regards their reliability.

12 So if it's akin to PX 19 and it's in this category, it
13 should come in. If it's akin to PX 13, it should stay out.

14 Now, does that leave you-all with any that you don't know
15 which category it should fall in or not, or does that give you
16 the guidance that you need?

17 MS. TUOHY: I think that can give us the guidance
18 that we need.

19 THE COURT: All right. Well, you have the benefit
20 of me here if there's something else you want me to look at,
21 but otherwise that's going to be the ruling that PX 13 and the
22 CNET news article is not pre-admitted, and PX 19, the filing
23 -- the 10-K filing with the Securities and Exchange Commission
24 for Vivint is pre-admitted. And I'm happy to address any
25 other documents within this category, but if that gives you

1 the guidance you need, then that should resolve what's not
2 been resolved by the meet and confer efforts of the parties.

3 MS. TUOHY: Thank you.

4 THE COURT: So as they say at the wedding, speak now
5 or forever hold your peace.

6 MS. ACHARYA: I think we've got it, Your Honor.
7 Thank you.

8 THE COURT: Does that leave us, counsel, then where
9 we have a known and established universe of pre-admitted
10 exhibits that can be furnished to the Courtroom Deputy in
11 advance of trial and we start this case knowing where
12 everybody is?

13 MS. ACHARYA: Yes, Your Honor.

14 MR. SMYSER: Your Honor, could we just take two
15 minutes just to look at the other exhibits to make sure that
16 we --

17 THE COURT: That's perfectly fine, Mr. Smyser.

18 MR. SMYSER: Thank you, Your Honor.

19 (Pause in proceedings.)

20 MR. SMYSER: Thank you, Your Honor.

21 May I approach the podium?

22 THE COURT: You may.

23 MR. SMYSER: Greg Smyser for the Plaintiff Fractus
24 S.A.

25 Your Honor, I think your guidance covers almost all the

1 exhibits in this category.

2 THE COURT: Almost?

3 MR. SMYSER: In that they are 10-Ks or internet
4 articles. The one exception I would make to that, I believe,
5 Your Honor, is what has been identified as proposed
6 Plaintiff's Exhibit 23. That is a document which bears an ADT
7 Bates stamp ending in 8962 through 8963, and I believe it is
8 an internet archive printout of ADT's website regarding the
9 Cellguard or cellular backup solution. I think in contrast to
10 either the 10-Ks on the one hand or the third-party articles,
11 this would qualify as an opposing party statement.

12 THE COURT: Can you furnish a representation of it
13 that I can look at?

14 MR. SMYSER: I believe so. I think this is it.
15 Yes.

16 THE COURT: This is from the Wayback Machine?

17 MR. SMYSER: That's right. It's an archive of the
18 website www.adt.com. The '80' I think is an artifact of the
19 backup system, but 'resources/cellular backup', and it bears
20 an ADT Bates stamp, as it was produced by ADT.

21 THE COURT: What's Defendant's position on PX 23?

22 MS. ACHARYA: Your Honor, I apologize. We had to
23 look at that. We don't have any objections to that.

24 THE COURT: All right. If there's not objection,
25 the PX 23 is pre-admitted.

1 MR. SMYSER: Thank you, Your Honor.

2 I think your guidance resolves the remaining disputes
3 that fall into this category.

4 THE COURT: All right. Is there anything else,
5 counsel, relating directly to the pretrial process that has
6 not been covered and needs to be addressed before I let
7 you-all go?

8 MR. TRIBBLE: No, Your Honor.

9 THE COURT: All right. Anything from Defendant?

10 MR. ZELIGER: Nothing from the Defendant, Your
11 Honor.

12 THE COURT: All right. This is not an absolute
13 statement, but my best guess at this point is you're going to
14 go to trial on July the 8th.

15 Let me ask you this. Are there any ongoing high-level
16 settlement negotiations or mediation efforts that might mean
17 that I won't see you on July the 8th? I don't want any
18 substance, but if there's something going on that I might need
19 to know about, tell me. If there's not, that's fine, too.

20 MR. NELSON: Your Honor, Justin Nelson from Susman
21 Godfrey.

22 The parties mediated in front of Judge Folsom
23 approximately in early May. Judge Folsom I believe has
24 indicated--I can only speak from the perspective of Fractus,
25 obviously--that after today he would re-engage, so I would

1 expect --

2 THE COURT: That would fit his usual practice. He's
3 tenacious.

4 MR. NELSON: So I would expect, Your Honor, that
5 there will be ongoing settlement discussions, but really since
6 that time and the immediate aftermath there have not been, but
7 I would expect them to pick up over the next few days.

8 THE COURT: All right. Well, I'm going to assume
9 that we are on go for Monday the 8th. If anything changes
10 that I need to know immediately, I've got 40 or 50 good
11 citizens from six counties coming this way on Monday morning,
12 and if I have to turn them around as soon as they get here,
13 I'm going to be very unhappy. So if something should break
14 that brings this dispute to an across-the-board resolution,
15 certainly contact me or contact my staff, even if it's over
16 the holiday, and let me know.

17 MR. NELSON: Thank you, Your Honor; absolutely.

18 THE COURT: Okay. Anything further?

19 MR. TRIBBLE: Nothing, Your Honor.

20 THE COURT: All right. Let's go off the record for
21 a second.

22 (Discussion held off the record.)

23 THE COURT: Counsel, thank you for your attendance
24 and able argument today. That completes the pretrial process.
25 I'll proceed to enter an order memorializing the rulings I've

1 given you on the record, and unless something changes I will
2 see you when this case goes to trial.

3 Have a good Independence Day holiday.

4 The Court stands in recess.

5 And you're excused.

6 (The proceedings were concluded at 2:10 p.m.)
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1 I HEREBY CERTIFY THAT THE FOREGOING IS A
2 CORRECT TRANSCRIPT FROM THE RECORD OF
3 PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.
4 I FURTHER CERTIFY THAT THE TRANSCRIPT FEES
5 FORMAT COMPLY WITH THOSE PRESCRIBED BY THE
6 COURT AND THE JUDICIAL CONFERENCE OF THE
7 UNITED STATES.

8
9 S/Shawn McRoberts 07/17/2024

10 _____ DATE _____
11 SHAWN McROBERTS, RMR, CRR
12 FEDERAL OFFICIAL COURT REPORTER
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